TRANSCRIPT OF RECORD.

(63)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1920

No. [redacted] 216

YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS,

vs.

NICHOLS AND COMPANY.

WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

PETITION FOR CERTIORARI FILED JANUARY 3, 1920.

CERTIORARI AND RETURN FILED FEBRUARY 26, 1920.

(27,410)

(27,410)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 655.

HE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS,

vs.

NICHOLS AND COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

INDEX.

DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JANUARY 5, 1920.

1 & 2 *Organization of Court.*

Be it remembered that on this the 17th day of February, 1919, the Honorable Circuit Court of the Second Judicial District of Coahoma County, State of Mississippi, met according to law in regular session at the Court House in the City of Clarkdsale, in the District, County and State aforesaid.

Present and presiding: the Honorable Wm. A. Alcorn, Jr., Judge of the 11th Circuit Court District of the State of Mississippi; S. G. Salter, District Attorney; Jno. C. Sligh, Stenographer; J. O. Baugh, Sheriff, and J. E. Montroy, Clerk, when and where the following proceedings were held and done, to wit:

No. 2540.

NICHOLS & COMPANY, Plaintiffs,

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Defendant.

3 In the Circuit Court of the Second District of Coahoma County, Mississippi, September Term, 1918.

NICHOLS & COMPANY, Plaintiffs,

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Defendant.

Declaration.

Now comes W. B. Nichols and F. W. Nichols, partners under the firm name and style of Nichols & Company, by their attorneys, and complain of the Yazoo & Mississippi Valley Railroad Company, defendant, in an action of trespass on the case, for this:

That whereas, heretofore, to wit: On and anterior to the 3d day of November, 1917, the said defendant was a corporation organized and existing under and by virtue of the laws of the State of Mississippi, and was then engaged and has since said time, been continuously engaged in the business of operating a line of railroad from the City of New Orleans, in the State of Louisiana, to the City of Memphis, in the State of Tennessee, and that along the line of said railroad so maintained and operated by the said defendant, the said defendant maintains a station in Bolivar County, Mississippi, known as Alligator. That the said defendant was on and anterior to the said 3d day of November, 1917, and has since said time con-

tinuously been engaged in the business of operating railroad locomotives, trains and cars for the transportation of persons and property for hire, and was then and has continuously since then, been engaged in the business of a common carrier of passengers and freight for hire, and as such common carrier became subject to all the
4 laws of the State of Mississippi applicable to such common carrier.

Plaintiffs allege that on the said 3d day of November, 1917, they were the owners of thirty-one boles of cotton of the aggregate value at said time of Seven Thousand Dollars, and that said cotton was then at the station of the said defendant known as Alligator as aforesaid. That the said plaintiffs then desired to have said cotton transported from the said station of Alligator, to the said City of Memphis, in the State of Tennessee, and for that purpose the said plaintiffs made application to the said defendant to transport said thirty-one bales of cotton from the said station of Alligator, in the said county of Bolivar, and State of Mississippi, to the said City of Memphis, and said plaintiffs allege that the said defendant then and there provided one of its railroad cars, and a railroad car which was then in the possession and under the control of the said defendant, so that the said property of the said plaintiffs might be loaded in said car for transportation from the said station of Alligator to the City of Memphis.

Plaintiffs allege that they delivered the said cotton to the said defendant at the special and particular place at the said station of Alligator at which the said defendant directed the said plaintiffs to deliver the same, and that when said cotton had been so delivered by the said plaintiffs to the said defendant, the said cotton was loaded in the said railroad car so owned and controlled by the said defendant as aforesaid, and after said cotton had been so loaded in the said car last aforesaid, the said defendant then and there issued and delivered to the said plaintiffs a contract in writing, whereby in accordance with the terms whereof, the said defendant undertook and agreed to and with the said plaintiffs, to transport the said cotton from the said station of Alligator over its said line of railroad, to the City of
5 Memphis, in the State of Tennessee, and there safely deliver the same to the consignee of said cotton, who was named in the said contract as Goodlett & Company, at and for the rate and price for said transportation of $91.44. Plaintiffs file herewith, as part hereof, as Exhibit "A" hereto, a copy of the said contract or bill of lading aforesaid.

Plaintiffs allege that after the delivery by the said plaintiffs to the said defendant of the said cotton last aforesaid, they paid to the said defendant, in lawful money of the United States, the said charges for the transportation thereof as aforesaid, to wit: the said sum of $91.44.

Plaintiffs allege that by reason of the said contract for the transportation and delivery of said cotton as aforesaid, and the said payment of said sum of $91.44 it became and was the duty of the said defendant, safely to care for the said cotton, and safely and speedily to transport the said cotton from the said station of Alligator to the

said City of Memphis, and there deliver the same within a reasonable time, to the said Goodlett & Company, consignees, as directed by the said plaintiffs.

Plaintiffs allege that the said defendant did not perform and has not performed its contract and obligations last aforesaid, because plaintiffs say that the said defendant has wholly failed and refused to transport the said cotton or any part thereof from the said station of Alligator to the said City of Memphis, and there deliver the same on the order of the said plaintiffs to the said consignees, to wit: the said Goodlett and Company.

Plaintiffs allege that although they have heretofore demanded of the said defendant the transportation and delivery of said cotton in accordance with its aforesaid agreement and undertaking, so to deliver the same, the said defendant has hitherto wholly failed, to the damage of the said plaintiffs in the sum of Seven Thousand and Ninety-one & 44/100 Dollars.

6 Wherefore plaintiffs sue and demand judgment against the said defendant, for said sum of Seven Thousand and Ninety-one & 44/100 Dollars ($7091.44), together with interest and cost.

CUTRER & JOHNSON,
Attorneys for Plaintiff.

Uniform bill of lading—standard form of straight bill of lading approved by the Interstate Commerce Commission by Order No. 787 of June 27th, 1908.

z 3-17. 10,000 Pads, 50 Sets, Collated. Form Y 195-3. Revised 12-08.

The Yazoo & Mississippi Valley Railroad Company.

Shipper's No. —.

Straight Bill of Lading—Original—Not Negotiable.

Agent's No. C 195.

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Alligator, Miss., November 3d, 1917, from Nichols & Company, the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be

7 subject to all the conditions, whether printed or written,

herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assignees.

The rate of freight from —— to —— is in cents per 100 lbs.

If —— Times 1st.	If 1st Class.	If 2nd Class.	If Special. Per —— ——.
If 3d Class.	If 4th Class.	If 5th Class.	If Special. Per —— ——.
If —— Class.	If —— Class.	If Rule ——.	If Rule ——.

Consigned to Goodlett & Company.
Destination: Memphis, State of Tennessee. County of ——.
Route, —. Car Initial: I. C. Car No. 58705.

No. packages.	Description of articles and special marks.	Weight (Subject to correction).	Class or rate.	Check column.
31	B/C. All X.			
	No. 599-806-880-887-897-902-901			
	908-917-920-921-918-930-950-945			
	937-1000-1001-948-1009-1003-1039			
8	1075, 1078, 1086, 1083			
	1099, 1110, 1111, 1124			
	1126.			
	or		17061	
	All Tax.			

If charges are to be prepaid, write or stamp here "To be Prepaid."	Received $— to apply in prepayment of the charges on the property described herein. ——, *Agent or Cashier,* Per —— ——. (The signature here acknowledges only the amount prepaid.)	Charges Advanced. $——

C. J. MARSHALL,
Agent,
Per I. M. SEAB.

NICHOLS & COMPANY,
Shipper,
Per F. W. NICHOLS.

(This bill of lading is to be signed by the Shipper and Agent of the carrier issuing same.)

Conditions.

Section 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner or for differences in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage, or delay caused by fire occurring after forty eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carriers liability shall be that of warehouse man only. Except in cases of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, or damage, or delay occurring while the property is stopped and held in transit upon request of the shipper owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom, on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Section 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

Section 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement endorsed hereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment under this bill of lading.

Except in cases where the loss, damage, or injury complained of is due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, claims must be made in writing to the carrier at the point of delivery or at the point of origin

within six months after the delivery of the property, or, in case of failure to make delivery, then within six months after a reasonable time for delivery has elapsed. Suits for recovery of claims for loss or damage, notice of which is not required, and which are not made in writing to the carrier within six months as above specified, shall be instituted only within two years after delivery of the property, or, in case of failure to make delivery, then within two years after a reasonable time for delivery has elapsed. No claims not in suit will be paid after the lapse of two years as above, unless made in writing to the carrier within six months as above specified.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

11 Section 4. All property shall be subject to necessary cooperage and baling at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procuring such compression. Grain in bulk consigned to a point where there is a railroad, public, or licensed elevator, may (unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Section 5. Property not removed by the party entitled to receive it within forty eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for shortage and to carrier's responsibility as warehouse owner, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a reasonable charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this section shall be construed as lessening the time allowed by law
12 or as setting aside any local rule affecting car or storage.

Property destined to or taken from a station, wharf or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharfs, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.

Section 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classifications or tariffs, unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Section 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Section 8. The owner or consignee shall pay the freight and all other lawful charges accruing upon said property, and, if required shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Section 9. Except in case of diversion from rail to water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes or this section, and subject also to the condition that no carrier or party in
13 possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breaking of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranding, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including li-*ther*age across rivers or in lake or other harbors, and the liability for such li-*ther*age shall be governed by the other sections of this instrument.

If the property is being carried under a tariff which provides that any carrier or carriers party thereto shall be liable for loss from perils of the sea, then as to such carrier or carriers the provisions of this section shall be modified in accordance with the provisions of the tariff, which shall be treated as incorporated into the conditions of this bill of lading.

Section 10. Any alteration, addition or erasure in this bill of lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be without effect and this bill of lading shall be enforceable according to its original tenor.

Endorsed on the back of said Declaration is the filing thereof, which said filing is in words and figures as follows, to-wit:

Filed July 25th, 1918.

J. E. MONTROY,
Clerk.

Circuit Court.

Under Code 1906.

(Box 318.)

Register Print, Clarksdale, Miss.

14 *Summons.*

The State of Mississippi to the Sheriff of Coahoma County, Greetings:

We command you to summon Yazoo & Mississippi Valley Railroad Company if to be found in your County, personally to appear before the Judge of the Circuit Court of said County, at a term thereof to be begun and holden for the County aforesaid, at the court house thereof, in the City of Clarksdale, on the 4th Monday of September, A. D. 1918, then and there to answer to the complaint filed against it in said Court by W. B. Nichols and F. W. Nichols composing the firm of Nichols & Company.

Herein fail not, and have then and there this writ, with your return endorsed thereon, showing how you have executed the same.

Witness my hand as Clerk, with the seal of said Court hereunto affixed this 25th day of July 1918.

J. E. MONTROY,
Clerk.

15 *Sheriff's Return.*

I have this day executed the within writ personally, by delivery to the within named defendant J. W. McNair, Agent at Clarksdale, Mississippi, for Y. & M. V. R. R. Co., a true copy of this writ, this 26th day of July A. D. 1918.

J. O. BAUGH,
Sheriff,
By FRANK HARRIS,
Deputy.

Fees:	
Service	$1.50
Entering & Returning	.50
Total	$2.00

Endorsed on the back of said Summons is the filing thereof, which said filing is in words and figures as follows, to-wit:

Filed 26th day of July 1918.

J. E. MONTROY,
Clerk.

16 In the Circuit Court for the Second Judicial District of Coahoma County, Mississippi, September Term, 1918.

NICHOLS & COMPANY

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Now comes the defendant Yazoo & Mississippi Valley Railroad Company by its attorneys to record and for plea to the plaintiff's declaration herein says that it is not guilty of the said several trespasses in the said declaration mentioned, nor is it indebted to the said plaintiff in the manner and form as therein alleged, and of this the said defendant puts itself upon the country.

SCOTT & YERGER,
Defendant's Attorneys.

To Nichols & Company, plaintiffs in the above styled cause of Messrs. Cutrer and Johnson, their attorneys of record therein:

Take notice that on the trial of said cause the defendant will introduce evidence to prove that the thirty one bales of cotton referred to in their said declaration was delivered to and received by them at about the hour of — P. M. on the — day of November, 1917, and that shortly thereafter the said thirty one bales of cotton last aforesaid were loaded by the said plaintiffs or their employees on cars owned by or under the control of said defendant and thereupon issued to the said plaintiffs a bill of lading in writing;

That the said cars on which said cotton was loaded as aforesaid, were at the time they were so loaded on a private or other siding or sidetrack, located near the defendant's depot building at Alligator, Mississippi;

17 That thereafter at about — o'clock — A. M. a fire originated in the gin house and property owned by one N. M. Parks;

That the said defendant had no interest in or title to the property in which the said fire originated and did not have anything whatsoever to do with the said property which was located some distance from any property which was owned by the said defendant company;

That neither the said defendant or any of its agents or employees were guilty of any kind of negligence which caused the said fire last aforesaid to originate and that in spite of efforts to prevent the same, the said above mentioned cotton was set afire by sparks from said fire which originated as above stated, and that as a result thereof all of the said cotton was destroyed before it was moved from the point of shipment, Alligator, Mississippi, under the said bill of lading above referred to, and before it was moved from said private or other siding or side-track last aforesaid;

That no train of cars being operated or scheduled to be operated by the said defendant company, moved North from Alligator Lake

o Memphis, Tennessee, by or on which the said cotton last aforesaid ould have been moved out of Alligator, Mississippi, in the direction f its destination, Memphis, Tennessee, by reason of the cause of ny negligence on the part of said defendant company its agents r employees;

And, that the destruction of said cotton by fire as above stated, nd the consequent failure of the defendant to deliver the same to he consignee thereof at Memphis, Tennessee, was not due to any egligence on the part of said defendant or any of its agents or mployees;

That the proximate cost of the destruction of said cotton last aforesaid in the manner above stated and the consequent 8 failure on the part of the defendant to deliver same to the consignee thereof at Memphis, Tennessee, was the fact;

That said cotton was destroyed by fire set out and communicated o it as above stated;

And, that the loss and destruction of said cotton last aforesaid vas due wholly and entirely to a purely accidental fire which origiated as above stated, and as to which fire in its origin and progress he defendant, its agents and employees were wholly free from any blame or negligence, and the said fire was the independent, interening, proximate cause of the loss and destruction of said cotton or the value of which the plaintiffs sue.

SCOTT & YERGER,
Defendant's Attorneys.

9 In Circuit Court, February, 1919, Term.

No. 5540.

STATE OF MISSISSIPPI,
Coahoma County,
Second District:

NICHOLS & COMPANY

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

On the trial of the above styled and numbered cause, the following proceedings were had and testimony introduced, to-wit:

F. M. NICHOLS, a witness introduced for and on behalf of the plaintiffs, having first been duly sworn, testified as follows, to-wit:

Mr. J. W. Cutrer: Where do you live?
A. Hillhouse.
Q. Where did you live in 1917?
A. Alligator, Mississippi.

Q. What business were you engaged in that year?
A. Farming.
Q. How far was your farm from Alligator?
A. About three and a half miles.
Q. East or West?
A. West.
Q. Whom were you engaged in business with?
A. Brother W. B. Nichols, firm of Nichols & Company.
Q. Were you, or not, during the year, engaged in growing cotton?
A. Yes sir.
Q. What was your railroad shipping point, Mr. Nichols?
A. Alligator, Mississippi.
Q. On what line of railroad is that?
A. Y. & M. V.
Q. Defendant in this case?
20 A. Yazoo & Mississippi Valley Railroad Company.
Q. State to the jury whether the Y. & M. V. Railroad Company maintained a depot and depot ground at Alligator?
A. Yes sir; they did.
Q. During November, 1917, was or not a depot agent engaged there by the railroad company?
A. Yes sir he was.
Q. How long has some agent been in charge of the business at that point?
A. Ever since 1910.
Q. Was there or not a regular station for freight and passengers?
A. Yes sir.
Q. How many agents were there during November, 1917?
A. There were three I know.
Q. What sidings or facilities did the railroad company have for handling, or delivering freight?
A. They had a spur that goes around to Clark's gin at that time, and also one that goes down to Mr. Kline's gin.
Q. What other tracks, or facilities did they have for handling freight, in the way of track?
A. Well, they had sidetracks there next to the house for handling the freight.
Q. House tracks?
A. Yes sir.
Q. You spoke of a siding which ran over toward the gin of Mr. Rainer, on which side of the main line of the railroad was that track?
A. It was on the east side.
Q. About what point would it leave the main line, or siding, of the railroad company?
A. I suppose about one hundred feet below the dirt road crossing, something like that. I don't know, exactly, something like two hundred feet below the depot.
21 Q. Did you make application, or not, on the 3d of November, 1917, for a car in which to load cotton, to be shipped to Memphis, Tennessee?

A. My recollection is I made application on the 2d, and got the car on the 3d.

Q. To whom did you make application?

A. Mr. J. C. Marshall the agent.

Q. Made application to him?

A. Yes sir.

Q. On the 3d, did you not go there to see about loading the car?

A. He promised to give me a car, and I carried some man out there.

Q. What, if anything, did he do about pointing out the car that you were to use in loading the cotton for Memphis?

A. I ask him for a car that would hold about forty-four bales of cotton, a good big car, and he told me that morning that he could not get a big car, but I would have to load a certain freezer that he had put out at Mr. Park's platform,—that is where we ginned our cotton. At A. M. Park's gin.

Q. What, if anything, did he do about designating to you the car you were to use for loading the cotton?

A. If I remember aright, that was the only empty box car that was at the platform at that time. He told me to go ahead and move that car.

Q. What did he do about making any further spotting or placing of the car, than it was when he pointed it out to you?

A. Well, he placed it down to this cotton platform.

Q. And so informed you?

A. Yes sir.

Q. What, if anything, did you do then, about loading the car that he pointed out to you?

A. Just as soon as he placed it at this platform, I had men out there ready to load it. Just as soon as they placed this car,

22 I went to work loading.

Q. As soon as they placed it?

A. As soon as they placed it at Mr. Park's platform, the railroad company, it was a local engine put it in there, the train crew.

Q. Well, then, who supervised the loading of the car of cotton?

A. I did myself.

Q. How many bales of cotton went into the car?

A. Thirty-one.

Q. Do you know anything about the weights of the cotton that went into the car?

A. Of course, I could not tell you the individual weights, but the weights on here are correct, according to the gin tickets. I got the weights from the gin tickets.

Q. As the cotton was ginned?

A. When the cotton was ginned, they gave us the gin tickets showing the number of weights of the cotton, and that is where I got the weights of this cotton.

Q. What was the weight of the thirty one bales of cotton?

A. 17,061.

Q. I will ask you to state to the jury what was the character and grade of that cotton?

A. Well, it was nice, clean cotton. It was 3/16 and there was a few bales of inch and a quarter, and there was three bales of inch and half in this car.

Q. Well, at the time that cotton was loaded in the car, I will ask you to state to the jury what was the cotton worth on the market.

A. It was worth all the way from about 36 to 45 cents on the market.

Q. Had you, or not, been selling cotton before that time?

A. Yes sir.

Q. And that was the car of the cotton?

A. Yes sir.

23 Q. Now, after the cotton was loaded in the car, what, if anything did you do about receiving from the railroad company any paper evidencing the receipt of this cotton by the railroad company?

A. Just as soon as I got through loading this cotton, I went up to the office and got a bill of lading on this cotton, and turned it over to the railroad company, or their agent.

Q. Well, what, if anything, did the agent do about giving you any bill of lading, or paper?

A. Well, he made out a bill of lading, and signed it, and gave me two, and he kept one.

Q. What is that paper that you have in your hand, now?

A. That is the original bill of lading that he gave me.

Q. Before offering this in evidence, I observe on the fac*t* of it some letters in red pencil marked "Held for average". I will ask you to state whether or not that was on there when you received, or after you received it?

A. It was *o*ut on there since I received it.

Q. Endeavoring to adjust this loss?

A. Yes, sir.

The contract is offered in evidence.

Mr. Scott: Defendant objects because it is not a complete contract, and has a large piece of paper pasted over the clause on which we must largely rely; but the copy filed with the declaration is identical and counsel can compare it, and I have no objection to that. I am more than willing if counsel can compare what he filed with his declaration, which he says is a true copy of the original, and I am perfectly willing for that copy to be used as the original, but I want the full contract before the Court, and not a part of it.

The court re*v*erses a ruling.

The paper thus offered in evidence*d* is marked Exhibit "A" and is in words and figures as follows, to-wit:

24 EXHIBIT "A".

Uniform bill of lading—standard form of straight bill of lading approved by the Interstate Commerce Commission by order No. 787 of June 27, 1908.

D-12-13—6000 Pads
50 Sets, collated.

Form Y 195-3
Revised 12-08.

The Yazoo & Mississippi Valley Railroad Company.

Shipper's No. ——.
Agent's No. C. 195.

Straight Bill of Lading—Original—Not Negotiable.

Received, subject to the classifications and tariffs in effect on the date of issue of this original bill of lading, at Alligator, Mississippi, November 3d, 1917, from Nichols & Company the property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to its usual place of delivery at said destination, if on its road, otherwise to deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained (including conditions on back hereof) and which are agreed to by the shipper and accepted for himself and his assigns. The rate of freight from —— To —— is in cents per 100 lbs. —.

25

If —— Times 1st.	If 1st Class.	If 2nd Class.	If Special. Per —— ——.
If 3rd Class.	If 4th Class.	If 5th Class.	
If —— Class.	If —— Class.	If Rule ——.	If Special. If Rule ——.

Consigned to Goodlett & Company.
Destination: Memphis, State of Tenn. County of —.
Route. —. Car Initial: I. C. Car No. 58705.

No. packages.	Description of articles and special marks.	Weight (Subject to correction).	Class or rate.	Check column.	If charges are to be prepaid write or stamp here, "To be Prepaid."
31	B/C. All X.				
	No. 509-893-880-887-897-902-901-908-917-920-921-918-930-950-945-937-1000-1001-948-1009-1063-1089-1075-1078-1086-1083-1099-1110-1111-1124-1126.				
	or	17061			Received $———
	All tax				To apply in prepayment of the charges on the property described hereon.
26					
					Agent or Cashier Per ———
	Hold for average.				(The signature here acknowledges only the amount prepaid). ———
					Charges advanced: $———.

NICHOLS & COMPANY,
Shipper,
Per F. W. NICHOLS.
(Shipper must sign here.)

C. J. MARSHALL,
Agent,
Per I. W. SEAB.

(The signature of the Agent here acknowledges only the receipt of the property.)

Conditions.

Sec. 1. The carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto, except as hereinafter provided.

No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for differences in weights of grain, seed, or other commodities
27 caused by natural shrinkage or discrepancies in elevator weights. The loss, damage, or delay caused by fire occurring after forty eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only. Except in case of negligence of the carrier or party in possession (and the burden to prove freedom from such negligence shall be on the carrier or party in possession), the carrier or party in possession shall not be liable for loss, damage, or delay occurring while the property is stopped and held in transit upon request of the shipper, owner, or party entitled to make such request; or resulting from a defect or vice in the property or from riots or strikes. When in accordance with general custom on account of the nature of the property, or when at the request of the shipper the property is transported in open cars, the carrier or party in possession (except in case of loss or damage by fire, in which case the liability shall be the same as though the property had been carried in closed cars) shall be liable only for negligence, and the burden to prove freedom from such negligence shall be on the carrier or party in possession.

Section 2. In issuing this bill of lading this company agrees to transport only over its own line, and except as otherwise provided by law acts only as agent with respect to the portion of the route beyond its own line.

No carrier shall be liable for loss, damage, or injury not occurring on its own road or its portion of the through route, nor after said property has been delivered to the next carrier, except as such liability is or may be imposed by law, but nothing contained in this bill of lading shall be deemed to exempt the initial carrier from any such liability so imposed.

28 Section 3. No carrier is bound to transport said property by any particular train or vessel, or in time for any particular market or otherwise than with reasonable dispatch, unless by specific agreement endorsed thereon. Every carrier shall have the right in case of physical necessity to forward said property by any railroad or route between the point of shipment and the point of destination; but if such diversion shall be from a rail to a water route the

liability of the carrier shall be the same as though the entire carriage were by rail.

The amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property (being the bona fide invoice price, if any, to the consignee, including the freight charges, if prepaid) at the place and time of shipment under this bill of lading, unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurrs from negligence.

Claims for loss, damage, or delay must be made in writing to the carrier at the point of delivery or at the point of origin within four months after delivery of the property, or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed. Unless claims are so made the carrier shall not be liable.

Any carrier or party liable on account of loss of or damage to any of said property shall have the full benefit of any insurance that may have been effected upon or on account of said property, so far as this shall not avoid the policies or contracts of insurance.

29 Section 4. All property shall be subject to necessary cooperage and bailing at owner's cost. Each carrier over whose route cotton is to be transported hereunder shall have the privilege, at its own cost and risk, of compressing the same for greater convenience in handling or forwarding, and shall not be held responsible for deviation or unavoidable delays in procurring such compression. Grain in bulk consigned to a point where there is a railroad, public or licensed elevator, (may unless otherwise expressly noted herein, and then if it is not promptly unloaded) be there delivered and placed with other grain of the same kind and grade without respect to ownership, and if so delivered shall be subject to a lien for elevator charges in addition to all other charges hereunder.

Section 5. Property not removed by the party entitled to receive it within forty eight hours (exclusive of legal holidays) after notice of its arrival has been duly sent or given may be kept in car, depot, or place of delivery of the carrier, or warehouse, subject to a reasonable charge for storage and to carrier's responsibility as warehouseman only, or may be, at the option of the carrier, removed to and stored in a public or licensed warehouse at the cost of the owner and there held at the owner's risk and without liability on the part of the carrier, and subject to a lien for all freight and other lawful charges, including a reasonable charge for storage.

The carrier may make a responsible charge for the detention of any vessel or car, or for the use of tracks after the car has been held forty eight hours (exclusive of legal holidays), for loading or unloading, and may add such charge to all other charges hereunder and hold such property subject to a lien therefor. Nothing in this

section shall be construed as lessening the time allowed by law or as setting aside any local rule affecting car service or storage.

Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloading from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharfs, or landings shall be at owner's risk until the cars are attached to and after they are detached *to and after they are detached* from trains.

Section 6. No carrier will carry or be liable in any way for any documents, specie, or for any articles of extraordinary value not specifically rated in the published classification or tariffs, unless a special agreement to do so and a stipulated value of the articles are endorsed hereon.

Section 7. Every party, whether principal or agent, shipping explosive or dangerous goods, without previous full written disclosure to the carrier of their nature, shall be liable for all loss or damage caused thereby, and such goods may be warehoused at owner's risk and expense or destroyed without compensation.

Section 8. The owner or consignee shall pay the freight and all other lawful charges accruing on said property, and, if required, shall pay the same before delivery. If upon inspection it is ascertained that the articles shipped are not those described in this bill of lading, the freight charges must be paid upon the articles actually shipped.

Section 9. Except in case of diversion from rail or water route, which is provided for in section 3 hereof, if all or any part of said property is carried by water over any part of said route, such water carriage shall be performed subject to the liabilities, limitations, and exemptions provided by statute and to the conditions contained in this bill of lading not inconsistent with such statutes of this section, and subject also to the condition that no carrier or party in possession shall be liable for any loss or damage resulting from the perils of the lakes, sea, or other waters; or from explosion, bursting of boilers, breakage of shafts, or any latent defect in hull, machinery, or appurtenances; or from collision, stranded, or other accidents of navigation, or from prolongation of the voyage. And any vessel carrying any or all of the property herein described shall have the liberty to call at intermediate ports, to tow and be towed, and assist vessels in distress, and to deviate for the purpose of saving life or property.

The term "water carriage" in this section shall not be construed as including lighterage across rivers or in lake or other harbors, and the liability for such lighterage shall be governed by the other sections of this instrument.

Section 10. Any alteration, addition or erasure in this bill of lading which shall be made without an endorsement thereof hereon, signed by the agent of the carrier issuing this bill of lading, shall be

without effect, and this Bill of lading shall be enforceable according to its original tenor.

32 Q. So you have given a statement of the kind of cotton it was, who looked after the ginning, and handling of the cotton?

A. I did. I looked after having it hauled, and so on. Mr. Park looked after the ginning of it; yes sir.

Q. Well, Mr. Nichols, what became of that cotton, do you know?

A. Yes sir: It was burned.

Q. Where was it burned?

A. It burned on that railroad track in that car that I loaded it in.

Q. Of your own knowledge, do you know when it was burned?

A. It was burned about four o'clock Sunday evening.

Q. When was it loaded?

A. I started about eleven thirty, and finished at one o'clock, about November 3d.

Q. Do you know how many trains passed going North and South, after that car was loaded?

A. No sir, but I know there was a local due to go North Saturday afternoon.

Defendant objects. Objection overruled. Defendant excepts.

Q. You say there was one?

A. Due to go North, yes sir.

Q. What other place was designated by the railroad to you, at which to load that cotton, except where it was loaded?

A. None.

Q. What has been the custom of the railroad company with reference to the loading of cotton which was shipped to Memphis?

A. Well, we always loaded from this platform down to Mr. Park's Gin.

Q. Who directed you to do it.

A. The agent.

Q. What knowledge, if any, did you have that this was a private track, and not the track of the railroad company?

A. None whatever.

33 Q. What did the agent say to you about its being a private track, and not the track of the railroad company?

A. Never said anything.

Q. What information, from any source did you have that it was claimed to be a private track?

A. None whatever.

Q. You shipped other cotton to Goodwin & Company besides this, where was that grown?

A. On the same place as this, known as the Pritchett.

Q. As to the character and grade of cotton formerly shipped to them?

A. Raised on the same place, and by the same people.

Q. What kind of seed?

A. Some of it was Adair cotton, some of it Polk cotton, same grade, same staple, and everything.

Q. That was shipped before and after.
A. Yes, sir.
Q. I believe you *sayed* it was good clean cotton?
A. Yes sir.

Cross-examination.

Mr. Scott:

Q. What time in the morning was it you went there to Alligator?
A. What time did I go to Alligator?
Q. Yes?
A. I suppose about ten o'clock.
Q. About ten o'clock?
A. I suppose so; yes sir.
Q. The agent knew where your cotton was?
A. Yes sir.
Q. That you wanted to load?
A. Yes sir.
Q. It was on Mr. Park's platform?
A. Yes sir.
34 Q. And you had told him you wanted cars to load the cotton there?
A. Yes sir.
Q. And he had the cars put there to load the cotton?
A. Yes.
Q. I believe you said that the cotton, in your opinion, was worth all the way from 33 to 45 cents?
A. 36 to 45.
Q. How much of it was wofth 45 cents?
A. Three bales of it.
Q. What was that worth?
A. I suppose worth about 40.
Q. I didn't ask what you supposed?
A. I could not say what any of it was worth only judging from the price of the same cotton that we had sold.
Q. You don't know what any of it was worth at that time on the market, at Alligator, Mississippi.
A. No.
Q. About what time in the morning was it before you began loading this cotton?
A. About eleven thirty.
Q. About how long did it take you to load it?
A. About an hour and a half.
Q. That would make it about one o'clock?
A. Yes sir.
Q. And at about what time was it that you signed the bill of lading?
A. Well, just as soon as I could get from the farm up to the depot, not later than one thirty.

Q. This bill of lading, when you received it, did not have the yellow piece of paper pasted on the back of it?

A. No sir.

Q. Do you know when that was put on there?

A. No sir, I don't.

35 Q. I see this bill of lading is signed C. J. Marshal by I. N. Scab. Done by you as for Nichols & Company?

A. Yes sir.

Q. You don't know who that siding belonged to or who owned it, where your car was located?

A. No sir.

Q. You don't know anything about that, as a matter of course.

A. About that bill of lading being signed, Mr. Scab made it out and signed it on the typewriter, and I noticed it was signed, typewritten, C. J. Marshall by I. N. Scab. I had Mr. Marshall to sign it when he came in.

Q. What time did Marshall sign it?

A. Just immediately after it was made out.

Q. He was not in the room when Mr. Scab made it up and signed it?

A. He was when we started it, but not when he concluded it.

Q. The cotton was never moved off that siding, I believe?

A. No sir.

Q. It was burned at the same place where you loaded it, and left it, or do you know?

A. Yes sir; burned right close to the same place. They tried to move it by hand, but could not.

Q. Tried to move it, but could not?

A. Yes, sir.

Q. That cotton was not compressed?

A. No sir.

Q. It was just in ordinary bales?

A. Just plain bales of cotton.

Q. You said, I believe, you knew nothing about the fire?

A. I was there and helped to get the balance of the cotton off the platform, but I was not there when the fire started. I got there before this cotton caught a fire.

Q. How long, after you got there, before it caught fire?

36 A. I suppose twenty minutes.

Q. And efforts were made to move it, and it could not be moved?

A. Yes, sir; could not be moved at all by hand.

Redirect examination:

Mr. Cutrer:

Q. What engines did the railroad company provide to move the car?

Defendant objects.

The Court: I think he can state what was done.

Objection overruled.
Defendant excepts.

Q. How far was Alligator from Clarksdale?
A. About twelve miles.
Q. Both on the main line of the railroad?
A. Yes sir.
Q. You say that the car was moved, who moved the car?
A. Why, I could not say. There was a crowd there, and they ed to move this car out by hand, and there was some box cars next Mr. Rainer's gin, and they could not get it out, so they pushed e car back near where it was and left it.
Q. How many cars were on this siding? Do you know?
A. My recollection is there were five.
Q. Five cars?
A. I would not state positively, but I am pretty sure there were re, two coal cars, and two empty box cars, next to the railroad.
Q. In other words, used generally by the railroad company as ilroad siding?
A. Yes sir.
Q. Now, if these cars had not been in the — was there?
A. We could have got it far enough to where I don't think there ould have been any danger in it.
Q. But the railroad having put their cars there between the place f the fire and the end of the track, you could not get the car beyond it?
A. No sir.
Q. You would have had to move five cars in addition?
A. Would have had to move two cars.
Q. Well, now, Mr. Nichols, you were asked if you knew what the alue of the cotton was; now, I will ask you what, in your opinion as it worth?
A. I said just now, this cotton was worth from 36 to 45 cents, asing my opinion on the same grade cotton we have sold out of he same field the same year.
Q. On about the same market?
A. Yes sir.
Q. What, in your opinion, was the Polk cotton worth at that ime?
A. About 43 cents.
Q. That is what I want, your judgment about it.
A. That is what it was selling for at that time.
Q. What was the other cotton worth, in your judgment?
A. Worth forty-five cents.
Q. And the Polk cotton worth 42 or 43, and the other cotton was worth?
A. From 36 to 42 cents.
Q. What, in your judgment, was the 31 bales of cotton worth?
A. 40 cents a pound.

Q. You base your judgment upon your actual knowledge of the character and kind of cotton?
A. Yes sir.

Recross-examination:

Mr. Scott: Mr. Nichols, you were asked by Mr. Cutrer about the railroad company moving that car with an engine. There was no engine there, was there?
A. No sir.

38 W. B. Nichols, a witness introduced for an on behalf of the plaintiff, having first been duly sworn, testified as follows, to-wit:

Mr. Cutrer: What is your name?
A. A. B. Nichols.
Q. Where do you live, Mr. Nichols?
A. I live in Clarksdale.
Q. How long have you lived there?
A. Lived here about three years.
Q. Were you interested in business at Alligator in 1917?
A. Yes sir.
Q. How long had you been there?
A. About ten years. This is my eleventh year.
Q. During that time, what has been your shipping point?
A. Alligator for that business.
Q. Are you, or not, familiar with the facilities afforded by the railroad at that point, for the handling of freight?
A. Yes sir.
Q. I will ask you to state to the Court and jury just what the facilities have been during that time?
A. Well, the railroad has a cotton platform there which, I suppose would hold some fifty bales of cotton. Each gin—there were three gins there at that time—each gin has a platform that will hold something like 100 or 150 bales, each and each.
Q. Anyone loads the cotton from these gin platforms?
A. It has been the custom ever since I have been there.
Q. What other facilities does the railroad company provide for loading cotton in that way?
A. None at all. If it was not for these private platforms, the platform the railroad company has there would not hold half that is ginned.
Q. Do you know how many bales of cotton are shipped annually from Alligator?
39 A. In the neighborhood of six thousand bales, for the last ten years.
Q. What have you to say, Mr. Nichols, about the general use of this siding?
A. Well, it was used there by the railroad company just as any other switch was used.

Q. What information was ever given to you that this was a private
k, and not a railroad track?
A. None whatever, until this cotton was burned.
Q. How long had you been handling cotton that way, under the
ection of the railroad company agent?
A. Before this cotton was burned, about eight years.
Q. What had been the general system and practice of the railroad
mpany with reference to protecting you and your cotton?
A. We always went to the agent and ordered cars, when we would
ready to ship cotton, and they would out it at a platform, gen-
lly, and we would load it, and he would give us a bill of lading
it. I was engaged in business with Mr. Park there for five
rs.
Q. What, if anything, did the railroad company ever say or do to
licate that it was not a part of their railroad system?
A. None whatever.
Q. How was this loaded cotton handled differently from the other
tton you had loaded on this siding?
A. It was handled the same way.
Q. Can you give the jury any idea of how many bales of cotton
u handled in this same track?
A. Yes sir; Nichols & Company handled, I suppose, on an average,
0 bales a year, and I was connected with the Planters Mercantile
mpany there. I had part of that cotton loaded, and got bills of
ding for it, and they handled on an average of a thousand bales a
ar. I suppose I handled eight or ten thousand bales of cotton
there, in the n-igheborhood of it.
Q. Describe to the jury how it was handled?
A. It was loaded just as we loaded this. They would set
rs into the platforms, when we were notified by the agent, and we
ould unload the cotton in the car, and go to the agent, and get a
ll of lading for it.
Q. Will you state to the jury what, if anything, the railroad com-
any did about using that siding for other cars?
A. Yes sir. They would use it for switching purposes, and they
ould have cars, empty cars there frequently; you would see from
ne to half a dozen empty and loaded cars on the siding at the same
me.
Q. Do you know anything about car loads of fruit being loaded
om that siding?
A. Freight came in such as that, and things of that kind were all
nloaded from that side-track.
Q. Was that what was used as the team track?
A. This other team track has been built around the depot since
hat time. I suppose it was a track you would switch these cars in;
car load of feed, or anything. It would be switched into this track
o unload it. I have seen four or five cars of lumber at one time
eing unloaded on this track.
Q. Well, when these cars were placed in there to be unloaded,
lease state whether that was done with cars indiscriminately, or
nly with one particular class of cars on this track?

A. No; any cars of theirs. There are different cars belonging to different railroad companies.

Q. Shipped to different people?

A. Yes.

Q. What has been the practice of the railroad company with respect to that way of using the track, during the time you have been familiar with it? Has it not been used in that way?

41 A. Oh yes.

Q. What assertion did you ever hear made that anybody else beside the railroad company had control over that track?

A. Nothing at all. This trial came up before I began to investigate to find whose track it was.

Q. The railroad company turned down the claim, didn't they? Refused to pay it. Now, when this cotton was——

Defendant objects on the ground that it is incompetent. Objection overruled. Defendant excepts.

A. I didn't know that the railroad company claimed not to own the side track until after this cotton was burned.

Q. The cotton was consigned to Goodwin & Sons, Memphis, Tennessee. Have you a paper from the railroad company showing the payment of freight on this car?

A. I think I have a paid freight bill, yes sir; amounting to $41.44.

Mr. Scott: We don't deny that.

Plaintiff introduces paper in evidence, and is marked Exhibit "B", and is in words and figures as follows, to-wit:

42 EXHIBIT "B."

Freight Bill.

Memphis, Tenn., Nov. 10-17, 191—.

Freight
Bill No. 3932.

Goodlett Co.
c/o MFS Term Corp.

(Point of Origin to Destination).

Yazoo & Mississippi Valley Railroad Co., Dr.,

For Charges on Articles Transported.

From Alligator, Miss.	Way-Bill, Date and No. 11-3-17 17.	Full Name of Shipper Nichols Co., Ic.	Car Initials and No. 58705.
Point and Date of Shipment.	Connecting Line Reference.	Previous Way-Bill Reference.	Original Car Initials & No.

Number of packages, articles and marks.	Weight.	Rate.	Freight.	Advances.	Total.
31 B/C Mks. & Nos..... X 509, 866, 880, 887, 897, 930, 950, 902, 901, 908, 917, 920, 921, 918, 945, 937, 1000, 948, 1009, 1063, 1069, 1075, 1078, 1086, 1083, 1039, 1110, 1111, 1124, 1126. Total prepaid 8.....	17061	20/33	5630	3412	9042
Ms.					
Received payment ..... 191—.			Total		
....., *Agent.*					

43 Paid Nov. 14, 1917.

Memphis Terminal Corporation.

J. J. Wilbur.

For use at junction point on freight subject to connecting line settlement.

Rules.

1. This form must be prepared with typewriter, pen or indelible pencil; all information called for to be shown in full and in a clear and legible manner.

2. Weight, rate and charges must be shown in detail for less car load shipments.

3. Demurrage, switching, icing or other miscellaneous charges not included in the rate for transportation must be stated in detail and the points at which such charges accrued, shown.

4. When charges are assessed on track scales weights, gross, tare, and net weights on which charges are based and name of weighing section must be shown.

5. The route over which the shipment moved from point of origin to destination, including the initials of each carrier and name of each connecting line—junction point, must be shown.

6. Overcharges will be refunded only on presentation of original paid freight bills.

7. Claims for errors, loss or damage must be promptly made to agent, accompanied by original paid freight bill.

8. All freight will be subject to demurrage or storage charges, or both, as provided in published tariffs.

44 Q. Mr. Nichols, you are familiar with cotton grown on this place of Nichols & Company?

A. Yes sir.

Defendant objects, unless he is familiar with the cotton.

A. I bought the particular cotton, every bale at that time.

Q. Are you familiar with the cotton that was destroyed by fire?

A. Yes.

Q. You know the grade, character, and staple of the cotton?

A. Yes sir.

Q. I will ask you to state to the jury, in your judgment, what was the value of this 31 bales of cotton damaged by fire at Alligator?

A. I think the average we figured up amounted to a little better than forty cents a pound. It was the same cotton ground, the same negroes, the same crop, and the same year, and this basis was figured from this sale that was made of this cotton. Mr. Philip, Goodwin & Company, Memphis, agreed with the claim agent to settle with the average of the cotton in hand.

Q. What would you say, in your judgment, was the average value per pound, independent of all that?

A. About forty cents a pound.

Q. Wasn't that your best judgment?

A. Yes sir.

Cross-examination:

Mr. Scott: Mr. Nichols, you have spoken about loading your cotton, not only this, but other cotton from the platform there at the gin?

A. Yes sir.

Q. Very much more convenient to load it there, than it would have been if the railroad company had required you to haul it up to the other platform?

45 A. Frequently when we go to load cotton at the gin there, it is a good deal more trouble to load it that way, than if we had some place to haul it from a wagon and load it as soon as it was ginned.

Q. You would have had that same congested condition there?

A. We would not have had the congested condition there, if there had been some place to have loaded it when it was ginned.

Q. Wasn't it equally convenient for you to load it in this way?

A. We never objected to loading our cotton there.

Q. Never requested the agent to furnish you any other place?

A. No; frequently, now, I have hauled cotton when the railroad platform was not crowded.

Q. You would sometimes take it up?

A. Haul a few bales there. Possibly if I had forty or forty five bales, would load thirty five of them and leave four or five bales.

Q. It was just as convenient for you to load it at the gin platform as on the regular cotton platform?

A. Yes; of course we never objected to that,

Q. You never requested the agent to let you load it anywhere else?
A. No where else to load it that I know of.
Q. Did you ever request the agent to let you load it anywhere else?
A. I have been refused permission to load it on the platform there.
Q. You didn't have anything to do with loading a shipment of this cotton.
A. This particular cotton yes.
Q. And you never requested him to let you load it somewhere else?
A. This particular cotton, yes sir did not.

Redirect examination:

Mr. J. W. Cutrer: Asking an original question: Are you not familiar with the freight trains coming through Alligator?
A. Yes sir.
Q. Well, I will ask you to state to the jury what that schedule was at that time?
46 A. Local went south there.

Defendant objects. Objection overruled. Defendant excepts.

A. Local went south about ten o'clock in the morning, and about three in the afternoon.
Q. I will ask you to state, if your knowledge of the way in which these cars were handled, whose business was it to handle*d* these cars of cotton?
A. Local freight always placed cars there, and would go in there and get them.
Q. I will ask you to state how long that custom and habit the railroad had continued?
A. Ever since I have been there.

N. M. PARK, a witness introduced for and on behalf of plaintiff, having first been duly sworn, testified as follows, to-wit:

Mr. Cook: Where do you live Mr. Park?
A. Alligator, Mississippi.
Q. How long have you lived there?
A. About thirty years.
Q. Mr. Parks I will ask you to state to the jury whether or not you are familiar with the side-track of the railroad at Alligator, Mississippi, running down to the gin operated by you?
A. Yes sir.
Q. How long have you been familiar with that side-track Mr. Park?
A. Why, since it was put in there. I don't remember the year it was put in, but since it was put in there.
Q. Were you familiar with the manner in which this track was used for the business of the railroad company?
A. In what way do you mean.

Q. Whether or not it was used indiscriminately for the loading and unloading of freight in Alligator, and of various parties using it for that purpose?

A. Yes sir never any objection that I have heard of about loading and unloading.

47 Q. Was it true, was it generally used for loading and unloading of freight there, by the people in the neighborhood?

A. Yes, sir.

Q. Well, I will ask you whether or not you owned the gin to which this track ran?

A. I own the gin; I didn't own the ground.

Q. You owned the gin?

A. Yes, sir.

Q. How long have you been interested in that gin?

A. Why Mr. Rainer and myself built that gin, I think it was in 1901 or 2. I am not very positive, but I think it was 1901.

Q. Have you had an interest in it from that time until now?

A. Yes, sir. He and I operated it jointly for several years, and then I took his interest in it.

Q. Have you ever had any notice from the railroad company that this track was a private track?

A. No, sir.

Q. Who built that track?

A. The railroad company built the track.

Q. Who repaired it?

A. I think they kept it up. I know the railroad company kept it up, and I presume that they were doing it at their expense. I don't know anything about that.

Q. You didn't have any notice that they were not doing it at their own expense?

A. No, sir.

Q. Was that the only kind of freight handled from this track?

A. No, sir.

Q. Was lumber ever loaded and unloaded from this track?

A. Various things loaded down there.

Defendant objects to as leading.

The Court: Don't lead the witness.

Q. I will ask you if any other commodities than cotton were loaded and unloaded from this track?

48 A. Yes, sir; several lots of lumber loaded around there. In fact it was the only place that lumber could be loaded.

Q. I will ask you, if you know, what proportion of the freight that came into Alligator, Mississippi, was unloaded from this track, in car load lots?

A. Well, that is rather a hard question, but I think at least half of it, in car load lots.

Cross-examination.

Q. Mr. Parks, the cotton that was destroyed was ginned at your gin?
A. Yes, sir.
Q. When was that gin constructed, you say?
A. I think 1901, not positive about that.
Q. Constructed by you and Mr. Rainer jointly?
A. Yes, sir.
Q. When was this track built?
A. About the same time as the gin.
Q. Built to serve that gin?
A. That was one of the ideas, yes, sir.
Q. Was it built at the request of yourself, or Mr. Rainer?
A. Not at my request. Mr. Rainer did that.
Q. Mr. Rainer arranged to have the track built?
A. In other words—I didn't own the land?
Q. Did Mr. Rainer own the land?
A. Yes, sir.
Q. And he arranged for the track?
A. Yes, sir.
Q. Mr. Parks, that track was the same track in which this particular car of cotton was loaded, was it not?
A. Yes, sir.
Q. Was it your gin that was destroyed by fire?
Yes, sir.
49 Q. And the fire which consumed this car of cotton was transmitted from the fire which consumed your gin?
A. Yes, sir.
Q. What was the cause, or the occasion, or the origin of the fire?
A. I have no idea in the world.
Q. Where did it originate.
A. I have no idea. The gin was almost destroyed when I got down there by—fire. In other words, I could not get to the gin at all.
Q. Was there any evidence there to indicate to you in what part of the building the fire originated?
A. It was burning all over the top when I got there.

Redirect examination.

Mr. Cook: Mr. Park, I will ask you how long this use that you have described, of this track continued?
A. The track is being used now.
Q. From the time of its construction until now?
A. Yes, sir.
Q. Uninterrupted?
A. I presume so. I don't know anything about that.

Mr. Scott: Don't state what you don't know of your own knowledge.

Q. Have you any information of any interruption?
A. No, sir.

J. C. RAINER, a witness introduced for and on behalf of the plaintiff, having first been duly sworn, testified as follows, to-wit:

Mr. Cutrer: What is your name?
A. J. C. Rainer.
Q. Where do you live, Mr. Rainer?
A. Memphis.
Q. Did you ever live near Alligator?
A. Yes, sir.
Q. When did you move to Alligator?
A. About twenty one years ago.
50 Q. What business did you engage in there, Mr. Rainer?
A. In the mercantile business and public ginning.
Q. Were you, or not, engaged in the farming business there?
A. I was a farmer too.
Q. Mr. Rainer, were your or not, familiar with the siding which is constructed on the eastern side of the railroad track, beginning a little south of the depot?
A. Yes, sir.
Q. How long have you been familiar with that siding?
A. Ever since it was placed there, about fifteen or sixteen years ago, I should say.
Q. I will ask you to state to the court who put the track in, who did the work, and furnished the materials?
A. Why, the Yazoo & Mississippi Valley Railroad Company constructed the track. They also constructed the dump, and they furnished rails and cars, ties, etc., all at their expense.
Q. Who has occupied and maintained that siding?
A. The railroad company.
Q. Over whose lands did it run?
A. My own, after leading the railroad company's land.
Q. What, if anything, did you do about giving permission to put a siding in theire?
A. I did give them permission.
Q. After you gave them permission, they constructed the siding?
A. Yes, sir.
Q. State to what extent this siding has been used for the general purposes of the railroad company as a carrier for the public?
A. I should say, previous to that time—it was the only team track in the town. We had a horse track at that time and it was not arranged so that the teams could unload, except at great inconvenience,
and this track has been used by the general public there for
51 loading and unloading of almost all car load lots for quite a good many years.
Q. What attempt was ever made to restrict the use of that siding, to your purposes, exclusively, in any way?
A. None that I know of.
Q. Well, what indication, if any, did the railroad company ever give the public that this was not a part of the general track facilities for handling freight at Alligator?
A. I have never heard any of them give any such information at all. In fact, the agents there usually have those cars switched down

there and I know I have made complaint about so many of them being there in my way, but I didn't get any relief, and kept putting them in there, and have never let up until they put the house track in there.

Q. Since the fire?

A. Since that fire.

Q. Well, when the railroad company undertook to put a track in there, you gave them the right of way?

A. Well, I didn't give them the land. I gave them permission to put it on my land; but I didn't deed them the land.

Q. I submit to you a paper which seems to be signed by J. T. Harahan and by J. C. Rainer. I will ask you to look at that paper, state what it is?

A. That is a contract that I had with the Y & M V Railroad company to put this sidetrack——

Q. Whom was that signed by?

A. Myself and J. T. Harahan, former vice-president of the Illinois Central Railroad Company.

Q. What is the date of that?

A. This is the 14th day of October, 1901.

Q. Mr. Rainer, I see attached to this paper, a certain blue print, or paper, which has certain lines on it. I will ask you to state whether or not that was attached to the paper at the time you signed it?

32 A. It has been so long I could not remember it, but it must have been this blue print attached when the paper came back to me, when this original contract came back to me, and I think it was attached when I sent it to them. I think I signed and sent it in for Mr. Harahan's signature.

Q. At any rate, when it wa- returned to you, it was there then?

A. It was there then.

Q. Where has this paper been kept by you?

A. It has been in my safe at Alligator Lake.

Q. When, if at all, was it ever placed on record?

A. I did not place it on record.

Q. When, if at all, did you, or anyone else, within your knowledge, give notice to the public that you had such a paper?

A. I never have given any notice to the public.

Q. It has been kept in your private files,—that is correct, is it?

A. Yes sir.

Q. I will read this paper to you, Mr. Rainer, (reading). I will ask you to state to the jury whether or not you did give the railroad exclusive possession of this property mentioned therein?

A. I have.

Q. I will ask you to state whether or not they have been maintained in quiet, peaceable, and exclusive possession of the property?

A. They have.

Q. Did, or not, the railroad company furnish all the materials, put up the embankment, and construct the track?

A. Yes sir.

Q. At what cost to you?

A. No cost to me at all.

Q. Did you ever make any claims against the railroad company for any damage to your property by fire?

A. No sir.

Q. I will ask you to state to the jury if it is not true that the railroad company has continued to be the owner of, and to have
53 had sole control of said spur track?

A. That is, of the material in the track. They have no title to the land, but they have title to everything else.

Q. Of the spur track, and all the materials used in the construction of it?

A. Yes.

Q. What objection has been made at any time to their sole and exclusive use of that property?

A. None whatever.

Q. I will ask you to state whether or not the public has availed itself of the use of said side track, under the instructions of the railroad company?

A. They have.

Q. And has there ever been any modification, or change of these articles at any time?

A. No sir.

Q. Either before or after this fire.

A. No sir.

Q. How has the maintenance of that side track been kept up by the railroad company as compared with the other side track?

A. Same maintenance by the section crew.

Q. Who has furnished all the materials for keeping it up?

A. The railroad company.

Q. How long has the railroad company had an agent at Alligator?

A. Ever since I have been there, twenty-one or two years.

Q. Who has directed the placing and handling of cars on that side track?

A. The depot agents down there, the local cars, where to switch the cars.

Q. And the business on that track has been handled exclusively under the direction of the railroad company?

A. Whenever I requested the agent to set a car on that track, the agent or conductor would have it placed where I wanted it, or anybody else getting a car, lots of friends would make a request
54 that they put them out on that track, the agent or conductor to switch them out on there.

Q. Who has the power to direct the placing of cars on that track?

A. The depot agent.

Q. Who else has the power to place cars on that track?

A. The conductors.

Q. Who else, outside of the employees of the railroad company?

A. I don't know that anybody else, except the employees of the railroad company.

Q. That continued to be so continuously from the time the track was built up until shortly after this fire.

A. Yes sir.

Cross-examination.

Q. Mr. Rainer, do I understand you to say that before this track was installed, or constructed, you made application to the railroad company for an industrial track, did you?

A. I did.

Q. What was your idea in doing that?

A. I wanted to erect a gin there, and I wanted to put my cotton platform and seed house on the track.

Q. You wanted it there for your convenience, and convenience of your patrons?

A. Yes sir.

Q. And they did construct the track on your application?

A. Yes sir.

Q. And the condition on which the track was constructed is embodied in this written contract that you have testified to?

A. Yes.

Q. Are you familiar with the location of the gin that was destroyed by fire on November 4th, 1917?

A. I am.

Q. Upon whose land was that gin constructed and standing at the time it was destroyed?

55 A. The land belongs to me, is leased to Mr. N. M. Park.

Q. To whom was the legal title to the land underlying the track adjacent to Mr. Park's gin at that time?

A. The legal title to everything along that track there is in me, and has been for twenty-one years.

Q. The track, then, was on your land?

A. Yes, sir.

Q. And that part of it on which this car was standing was on your land?

A. Yes; Mr. Park's gin, the gin that burned was on my land, also the siding that ran up to this gin was on my land.

Q. I hand you here what purports to be a duplicate original of the contract which you have just referred to in your direct examination, and ask you to explain it, and state whether it is a duplicate original of that contract?

A. The blue print; yes.

Q. The entire contract?

A. That is my signature, and I placed this in the safe soon after I got it, and it has been there ever since.

Q. Copy here is the copy that you had in your hands, and belonging to you, the copy that I have just handed you is what I got from the railroad. Will ask you whether the contract is executed in duplicate-originals?

A. What is you want me to tell you?

Q. I will ask you to examine the paper that I have just handed you, and ask you to state whether or not that paper is another duplicate or another copy of the contract which you had previousiy testified to on your direct examination?

A. I will have to read it over (Witness reads same).

Counsel agree that the copy of the contract just produced is a duplicate of the contract heretofore referred to, executed in duplicate at the same time.

Contract is offered in evidence, the one which the witness now has in his hands, and is marked Exhibit "C," and is in words and figures as follows, to wit:

56 Exhibit "C."

This Agreement, made and entered into this 14th day of October A. D. 1901, by and between the Yazoo & Mississippi Valley Railraid Company, party of the first part, and J. C. Rainer, of Alligator Lake, Mississippi, party of the second part,

Whereas the party of the second part is engaged in business at Alligator Lake, in the State of Mississippi, and in order to facilitate the carrying on of his business, desires to have a spur or side track constructed, connecting with one of the tracks of the party of the first part, at the said place, and extending thence to and upon the premises of the party of the second part, as shown by the red line on the plat which is hereto attached, it is now mutually agreed as follows:

1. The party of the second part hereby agrees to furnish, free of cost, to the party of the first part, all of the ground needed for the construction, use and maintenance of the said spur or side-track, so far as the same shall extend beyond the right of way and grounds of the party of the first part, and to give the party of the first part secure and exclusive possession, and the quiet and peaceable enjoyment thereon, so long as this agreement shall continue in force.

2. The party of the first part hereby agrees to lay and construct the said track and to furnish all of the material needed therefor.

3. The party of the second part hereby agrees to indemnify the party of the first part and save it harmless from any liability for damage by fire, which, in the operation of the said spur or side-track, or of any of the other tracks of the party of the first part, or from cars or engines on any of its tracks, may be communicated to any building or structure on the premises belonging to, or occupied by, the party of the second part, at Alligator Lake aforesaid, or to any goods, wares, merchandise, or property of any kind, which may be on said premises, or which may be stored therein, to whatever cause such fire may be attributable.

57 4. It is understood and agreed that the party of the first part shall be owner of, and have sole control of, the said spur or side-track, and all material used in its construction, and that the same shall remain personalty and shall not become a part of the realty, and that it shall have the right at any time in its discretion to abandon the use of the said track, and to take up and remove the said track, shall be given to the party of the second part thirty (30) days before the removal of the same shall be commenced.

6. This agreement shall be binding on the successors and assigns of the party of the first part, and on the heirs, executors, administrators and assigns of the party of the second part.

It witness whereof, the parties hereto have caused these presents to be executed in duplicate, the day and year first above written.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
By J. T. HARAHAN,
Second Vice President.

J. C. RAINER.

Approved:
GENERAL AUDITOR,
By B. L.

58 Redirect examination.

Mr. Cutrer: Mr. Rainer, you remember when it was after this track was originally built, when it was extended by the railroad company?

A. I don't think there has been any. There might have been the length of one rail extended there, after the gin was built. There is now another gin on that track. When that gin burned, there were two gins on the same track, but this gin that burned was at the far end of the track. If there has been any extension, it was probably one rail.

Q. What other gin was put on there?

A. I built another gin; I sold Mr. Park the gin that I had there, and built a new gin on the same track.

Q. But you don't remember how far it was extended?

A. I didn't know it had been extended at all.

A. About three years ago, if you remember?

A. I don't remember, because I didn't use that part of the track you see. I was further up the line.

Q. You have not observed how far it was extended?

A. If it was extended at all.

Recross-examination.

Mr. C. H. McKay: In any event, Mr. Rainer, any extension of the track didn't affect that part of the track adjacent to the gin which burned? It didn't affect it at all?

A. No sir.

Q. And such part of the track as was adjacent to that gin was constructed under the original contract, was it not?

A. Yes sir.

Mr. Cutrer: One original question: Mr. Rainer, in reference to this side track, I omitted to ask you whether or not the railroad company had put in a track scale on that track?

A. The railroad company has not put in a track scale. Mr. Park and Mr. Klein and myself have put in the track scale, and it *us* used

by the town in the way of car load stuff that come in there. We weigh out all our seed, and weigh in car loads of hay and grain.

59 Q. Is that, or not, the only track scale used by the railroad company at Alligator?

A. Yes sir.

Q. I will ask you to state to the jury whether or not the railroad company has continuously since that scale was put in there, used it in the settlement of freight coming in and going out?

A. I don't. I could not say. My bookkeeper has been doing that.

Q. I will ask you to state whether or not it has been used in connection with the business of the railroad company at that point?

A. They make a switching charge, and weighing the cars.

Mr. McCay: And that scale belongs to Mr. Park and you and Mr. Klein?

A. That was put in at our expense. The railroad did the work; but we paid the railroad for it.

F. N. NICHOLS, recalled, testified for plaintiff as follows, to-wit:

Mr. Cutrer: Mr. Nichols, I hand you the original bill of lading which was handed you yesterday, and which has the back torn, and a piece of paper pasted over part of it, to keep it together. Has that paper been removed now?

A. Yes sir.

Q. I notice some interlineations on the back of that bill of lading, written in ink; were those interlineations on the back of it, when it was delivered to you?

A. No sir; it was not.

Q. Put on there since?

A. Yes sir.

Q. Were they on there when you sent it to Memphis?

A. No sir.

Q. Mr. Nichols, you spoke yesterday about loading some cotton—I will ask you to state to the Court and jury what was the custom in reference to the receipt by the railroad company of cotton after it was loaded, and what else was to be done by shippers of freight from that side track except loading the car and notifying the agent of that fact?

60 A. We just asked for a car, and when it was out down there, we would go down there and load this cotton and go right up there and give the agent the weights and numbers, and he would give us a bill of lading, and that is all we would do.

Q. What was the custom there with respect to the delivery of cotton to the railroad company?

Defendant objects to leading.

A. No sir; we never had anything else to do with it after we got our bill of lading. We turned it over to the railroad company, and they sent it wherever it was to go.

Cross-examination:

Mr. McCay: You shipped a great many cars?
A. Yes sir.
Q. Always had a great many of those bills of lading in your possession?
A. Yes sir.
Mr. Cutrer: Bills of lading were taken by you and sent to the consignee?
A. Yes sir.
Q. Was your attention called to any printed matter on the back of any of those bills of lading?
A. No sir.

Defendant objects. Objection sustained. Plaintiff excepts.

WALTER NICHOLS, recalled for plaintiff, testified as follows, to-wit:

Mr. Cutrer: You were examined yesterday about the delivery of cotton, and about the location of tracks and all: I ask you, Mr. Nichols, if a car containing a carload of freight was placed on the siding upon which this cotton was destroyed, and the consignee notified by the railroad company or its agent, of the spotting of the car, what else was done, according to custom there for many years, as to the consignee receiving delivery of the freight on the track?
A. Why, he paid the freight on it, and unloaded it.
Q. After a car was loaded on that track, and the agent notified of the car being loaded, what else was to be done, according to
61 custom, by the consignee, with reference to the car having been delivered to or received by the railroad company for shipment?
A. We always got a bill of lading for it, and they shipped it out wherever it was to go to.
Q. What else was, according to custom, ever to be done by the shipper loading the car and notifying the agent of that fact?
A. Nothing; only to receive the bill of lading for it.
Q. And after the bill of lading was received, what other duty rested on the consignee with reference to the delivery of the cotton?
A. None whatever.
Q. Mr. Nichols, there is a plat attached to this paper that Mr. Rainer introduced yesterday and shows, within certain lines, the right of way of the railroad company?
A. Yes, I suppose so.
Q. Now, Mr. Nichols, I will ask you to point out to the jury on this plat, how close to the depot of the railroad company this spur track extended?
A. This is the dirt road. This is the second line here.
Q. That is the second line, and this is the dirt road crossing?
A. That would be sixty feet, exactly, according to that.
Q. Sixty feet from where this spur track starts from?
A. South of the depot.

Q. As I understand this, Mr. Nichols, the spur, or side track referred to starts from the main line at a point sixty feet south of the depot?

A. Yes sir; and the track extends on down to where the cotton was loaded.

Cross-examination:

Mr. McCay: Mr. Nichols, can you locate on this plat the position of the gin originally constructed there by Mr. Rainer and Mr. Park, at which this particular cotton was ginned?

A. Well, I think it was about here, sir. I think that is——

Q. Please indicate on the blue print by cross mark, the
62 point where that gin was located?

A. That is a seed house there, is it?

Q. Yes?

A. This is the gin, isn't it?

Q. That is the gin?

A. Now the car—let us see—the platform starts about here and goes back not quite to the corner of the seed house, but just beyond the gin. The car was in between those two marks here. I could not tell just where.

Q. As I understand you, Mr. Nichols, the gin that you referred to was the next building to the seed house which was constructed at the very end of the track?

A. Yes sir.

Q. Will you please take this rule and measure along the line of the track as indicated on the blue print and show how far from the switch point this gin was located?

A. Well, let us see. That wants to start at the switch corner, does it?

Q. Yes?

A. Well, it was about—practically nine hundred feet.

Q. Then, as I understand you from this plat, it appears that the gin was located at a point about nine hundred feet from the depot of the railroad company?

A. Well, nine hundred and sixty feet.

Q. From the switch point at which this track left the main line of the railroad company?

A. I suppose so.

Q. That switch point is about fifty feet from the railroad company depot?

A. About fifty or sixty.

Q. Placing this gin about a thousand feet from the railroad company depot?

A. Yes sir.

Q. Mr. Nichols, please also measure on this plat, and see
63 how far this gin stood from the railroad company right of way, and off the railroad right of way, at its nearest point thereto?

A. Well, it would be about 240 feet.

Q. Then, as I understand you, this gin was 240 feet from the railroad company's right of way at its nearest point to the right of way?

A. I think so; something like that.

Q. And the gin stood on the property belonging to Mr. J. C. Rainer?

A. I think so; yes.

Q. Mr. Nichols, you shipped a great many cars of cotton from Alligator to Memphis?

A. Yes; a good many.

Q. What is the regular rate of freight from Alligator to Memphis?

A. I could not tell you; it has been changed so frequently in the last few years.

Q. Do you know what the rate was in November 1917?

A. I could not tell you.

Q. Would you take this expense bill that you have introduced in evidence, and state from that what rate of freight was paid on this cotton?

A. Well, it was twenty and 33/100.

Q. Do you know what the twenty cents in that claim represents?

A. Twenty cents on one hundred pounds.

Q. You are not familiar, then, with the levy tax of the State of Mississippi?

A. Bolivar County has a levy tax of one dollar a bale. A bale weighing five hundred pounds, they pay one dollar a bale tax on it.

Q. So far as you know, you are not able to state exactly what those figures represent?

A. The advance is levy tax.

Q. I ask you, if you know of your own knowledge, Mr. Nichols, what the item on that freight bill represents?

54 A. I don't know as I do.

Q. That is all right. The freight varies because the rates have changed quite frequently within the last few years. In fact, I don't do any of the detail work there. I am in the office, but this outside work I never have had anything to do with it.

C. G. CALICUT, a witness introduced for and on behalf of the plaintiff, having first been duly sworn, testified as follows, to-wit:

Q. What is your name?

A. C. G. Calicut.

Q. Where do you live?

A. Alligator.

Q. How long have you lived there?

A. Nine years.

Q. What business are you engaged in at Alligator?

A. Farming and merchandise.

Q. Are you, or not, familiar with the location of side tracks and depot facilities at Alligator, on and prior to November 3d, 1917?

A. Yes sir.

Q. Mr. Calicut, I will ask you to state whether or not during that period you have lived there, you have been engaged in shipping and receiving freight in car load lots?

A. Yes sir; very frequently.

Q. State to the jury on what track, and in what way freight is delivered to the railroad company by consignees, when it comes in car load lots?

A. Well, I should say seventy five per cent of the car load shipments that came to Alligator were put on the track on the east side of the railroad, which was known as a team track.

Q. To what point would that track run, and where did it go?

A. It began about twenty feet south of the depot, and
65 parallel the main line then for two or three hundred yards, and branched off down in a southeasterly direction from the main line.

Q. To what point did it extend, do you remember?

A. It went below the two gins, Mr. Rainer's gin and Mr. Park's gin.

Q. Tell the jury whether or not during that time, you have been engaged in loading out car load lots of freight, and to what track that went at?

A. Yes sir; we loaded out all our cotton seed and any car load shipments that we had to make were loaded from this track.

Q. State to the jury in what way delivery of the freight on this track in car load lots was made by the railroad company?

A. Well, when it was loaded, it was signed for by the agent.

Q. In other words, you loaded the cars, and the agent was notified of that fact?

A. Yes sir.

Q. Then what was done by the agent with respect to accepting delivery?

A. When it was loaded, he signed the bill of lading, and that was all there was to it.

Q. What else was ever done during this period of time by the consignee, or the shipper of freight other than loading the car, notifying the agent, and taking a bill of lading for it?

A. Nothing else.

Q. What duty was imposed on the shipper except these things?

A. Nothing else.

Q. What has been the universal custom of the railroad company there, with reference to hauling out freight so delivered, and taking it to destination?

A. That was all that was ever done.

Q. Then what did the railroad company do with the cars so loaded?

A. They would pull it out, and take it away.

Q. Do you recollect anything about the fire that destroyed the cotton in controversy here?

66 A. I was not in town that afternoon on Sunday afternoon. I was not there when the fire started. I got there a while after the gin had almost burned.

Q. Well, what time does the local freight train North go along in November, 1917?

A. Well, it usually came along about four o'clock.

Q. Do you recollect what time it came along that day?

A. Well, I could not say exactly what time, but it was somewhere between 3:30 and 4.

Q. Did you know the agent of the railroad company at Alligator at that time?

A. Yes sir.

Q. Who was the agent at that time?

A. C. J. Marshal.

Q. Was there more than one assistant at that time?

A. He had two assistants. One I know of, Mr. Seab.

Q. You don't recollect the name of the other assistant?

A. No.

Q. During all the time that you have known this station and the business there, state to the jury whether or not the railroad company has maintained a depot and an agent there?

A. Yes; they have always had an agent since I have been there.

Q. That is, for receiving freight and delivering freight, and selling tickets?

A. Yes sir.

Q. Who, all the time, has had charge of the siding on which this car was billed?

A. The agent.

Q. Who else has exercised any control over this siding except the agent?

A. The railroad company and the agent.

67 Q. How was that siding handled differently from any other siding of the railroad company at that point?

A. No difference at all.

Q. Do you know the section foreman there, from time to time?

A. I knew him by sight. I was not very well acquainted with him.

Q. You knew his identity?

A. Yes sir.

Q. What did he do with respect to keeping this track in repair, like he did the other tracks of the railroad company?

A. They keep it in repair.

Q. What difference between the way this track was handled and the other tracks?

A. None whatever.

Q. What difference of supervision was there by the agent of the depot at Alligator over this track, than the supervision of the other tracks of the railroad company, at that point?

A. None that I know of.

Q. Were you living, during all this time, in Alligator?

A. Yes, sir.

Q. How far were you living from the depot and these tracks during this time?

A. About three hundred yards.

Q. How far was your place of business from these tracks?
A. About fifty yards.
Q. Were you there pretty generally all the time?
A. Yes, sir, I was there.
Q. Your testimony was the result of actual observation?
A. Yes, sir.
Q. With reference to the handling of freight at Alligator, until very recently, Mr. Calicut, is it, or not, true that the track facilities for handling freight were or were not limited?

Defendant objects to leading question. Objection overruled. Defendant excepts.

68 A. Well, they were very limited, until, possibly six or eight months ago.
Q. I will show you a diagram here Mr. Calicut, (showing blue print to witness) and ask you to point out to the jury the only other siding which was operated by the railroad company at that point, outside of the track on which this car of cotton was destroyed.
A. The only other siding they had besides this team track at that time was a short track that ran in front of the depot between the main line and the depot since then ——
Q. I am not talking about since then?

A Juror: That short track had no platform to it?

A. Had a cotton platform for the railroad company.
Q. Well, what size was that railroad platform?
A. Well, I judge it would hold about one hundred bales of cotton.
Q. How was it possible to get to that siding with a load of cotton on it, from a wagon, I mean this platform?
A. This is a crossing right here, and you have to drive up in a wagon, put the cotton on the railroad platform right here.
Q. Was it accessible, or inaccessible?
A. Well, it was used for small shipments. Very little used for car load shipments.
Q. Now, you have pointed out the house track, I want to ask to what extent this other side track was used for shipping and receiving car load lots of freight?
A. This track here was known as the team track. That was used,—well, I should say seventy five percent of the car load stuff was loaded and unloaded from this track.
Q. Now, you say the name of the agent was Mr. Marshal?
A. Yes, sir.
Q. Did you, or not, see Mr. Marshal after the fire?
A. Well, I didn't talk with him any about the fire until
69 Monday after the fire, Monday morning.
Q. Did you see him?
A. Yes.
Q. At what place Monday morning?
A. I saw him at the depot.
Q. What did he say to you as the reason why he had not gotten the cotton out?

Defendants objects to any conversation between Mr. Marshal and Mr. Calicut after the fire occurred.

At the request of Mr. Scoot, the jury retires, while the Court hears the evidence as to this conversation.

The Court: I will let him answer it.

A. Well, he said he had been too busy to bill it out. I just said to him Monday morning "Why didn't you get that cotton out of here Saturday evening" he said, "I was too busy to bill it out."

Q. What, if anything, did he say to you about the refusal of the railroad company, at his request, to send a switch engine around there to take out the car?

A. Well, he told me, as soon as the fire started Sunday evening—which was the farthest point away from the cotton platform at the gin—that he telephoned to Clarksdale and asked for a switch engine, and if they had sent him a switch engine, he could have saved the car of cotton; but they did not pay any attention to his request.

Defendant objects.
Objection overruled.
Defendant excepts.

The jury returns, and the foregoing testimony taken in the absence of the jury is read to the jury by the stenographer.

Q. What train was he talking about having gotten the cotton out if he had not been too busy?

70 A. That was the local, Saturday afternoon.

Q. That went North, then, he said, after the bill of lading was issued?

A. Yes sir.

Q. The distance from Clarksdale to Alligator is—do you remember?

A. Twelve miles.

Cross-examination:

Mr. Scott: When did this conversation occur, Mr. Calicut?

A. Monday morning, after the fire on Sunday.

Q. And the cotton was loaded on Saturday about noon?

A. Somewhere about that time.

Q. There were no local freight trains going North on Sunday?

A. No sir.

Q. The only train that went North, so far as the agent knew, was the one that went Saturday afternoon?

Plaintiff objects.

Q. So far as the agent told you—I say, the agent told you that there was a train had gone North Saturday, did he?

A. He said that the cotton was not billed out because he didn't have time to bill the cotton out, after the bill of lading was issued, before the local went North Saturday afternoon.

Q. Before the local went North Saturday afternoon?

A. Yes sir.

Q. Now then, what did Mr. Marshal say to you about any reply received by him from Clarksdale, at the time you say he had telephoned for a switch engine?

A. He said if they had sent it as he requested, he could have saved the car of cotton.

Q. To whom did he say he telephoned to Clarksdale, to the railroad office?

A. Why, he didn't say. He said he phoned to Clarksdale, for a switch engine.

71 Q. You don't know to whom he telephoned?

A. Don't know who he telephoned to; he didn't say.

Q. And he didn't say what reply was given him?

A. No; he didn't say. Just said if they had sent it, he could have saved the cotton.

Q. But he didn't tell you that they refused to send it?

A. No sir.

Q. Nothing as to what reply he got from Clarksdale as to why the switch engine was not there?

A. No sir.

Q. Do you remember what, it any, passenger train came along by Alligator Lake on Sunday afternoon?

A. Well, the Peavine came along about—well, I was not there when the fire broke out, but it came along, I judge, about forty-five minutes, or an hour after the fire started.

Q. About an hour after the fire started?

A. Yes sir.

Q. Entirely too late towards putting out the fire, or getting this car of cotton out?

A. So I was told; I was not there.

Q. Don't you know the fire had progressed so far at the time the Peavine came along that would preclude the possibility of saving anything there?

A. I don't know, of my personal knowledge, no sir.

Q. You were not present?

A. I was not present.

EDWARD ELDRIDGE, a witness introduced for and on behalf of the plaintiff, having first been duly sworn, testified as follows, to-wit

Mr. Cutrer: What is your name?

A. Edward Eldridge.

Q. Where do you live?

A. Memphis, Tennessee.

72 Q. What business were you in during the Fall and Winter of 1917, and the early part of 1918?

A. Workign for Goodlett & Company, cotton factors.

Q. What business were you in and your friends engaged in?

A. Cotton factors.

Q. How long have you been engaged in the cotton business?
A. About twelve years.
Q. Were you, or not, at that time, familiar with the character of cotton grown and handled by Nichols & Company, of Alligator, during the Fall of 1917?
A. Yes sir.
Q. I wish you would state to the jury whether or not you handled their cotton during that Fall prior to November 3d, 1917?
A. We had handled some of Mr. Nichols' cotton, but a very small portion of his cotton had been sold? We had received a number of bales for him. I don't remember the exact number, but the market was not just right, and we had not disposed of his cotton at that time.
Q. Do you know whether or not the firm of Goodlett & Company received this bill of lading from Nichols & Company?
A. Yes sir.
Q. This bill of lading has been introduced in evidence and marked Exhibit "A"?
A. Yes sir.
Q. After the receipt of that bill of lading from the railroad company, did the firm of Goodlett & Company receive any notice of freight due on the cotton?
A. We received this freight bill, and paid it.
Q. To the account of whom?
A. Nichols & Company.
Q. What is the date of the payment on that?
A. We paid the Memphis Terminal Corporation on November 14th, 1917.

73 Q. I wish you would state to the jury whether or not, afterwards, you were informed of the destruction of this car load of cotton?
A. Yes sir.
Q. Did Nichols & Company prepare a claim against the railroad company for this cotton?
A. Yes sir.
Q. Was there any agreement between you and the railroad company as to the value of the cotton?
A. No sir.
Q. Was there, or not, a statement made up by you as to the value of this cotton?
A. Yes sir.
Q. I will ask you to state upon what basis this valuation was made up?
A. When cotton is destroyed or loss, we file our claim on the basis of what we term Companion Cotton, cotton that did arrive on and about the date that the cotton that was lost and destroyed should have arrived.
Q. Well, did you, with a knowledge of this cotton and the grade of it, compile a statement of the valuation of this cotton?
A. Yes, sir.

Q. What was that cotton worth, as described to you by Nichols & Company?

A. Worth forty & 34½ cents per pound.

Q. I believe you say a claim was presented to the railroad company for the cotton?

A. Yes sir.

Q. Have you a letter from the railroad company in respect to that claim, or, first, before that was done, did you not deliver any paper to the railroad company?

A. I delivered all the papers ordinarily and regularly constituted claim- to the agent of the Y. & M. V. R. R. Co., and took his receipt for those papers.

74 Q. What is that you have in your hand there now?

A. This is their receipt for it.

Q. Read it to the jury?

A. (Witness does as requested).

Plaintiff introduces aforesaid paper in evidence, which is marked Exhibit "D," and which is in words and figures as follows, to-wit.

75 EXHIBIT "D."

M. A. Goodlett. John Phillips.

Goodlett & Company,

Cotton Factors,

421-422 Falls Building.

Consignments solicited.

Memphis, Tennessee,

February 18th, 1918.

Received from Goodlett & Company, Original freight bill, No. 3932, showing $91.44 having been paid on Yazoo & Mississippi Valley Railroad.

H. A. FIGAN,
T. C. A.

Alligator W B.
17.
11/3/17.
I. C. 58705.
31. BC. 17061-A. 20/33.

76 Q. What is the next receipt?

A. This is receipt for a claim, and the papers which constitute the claim; all the necessary papers.

Q. Just read that to the jury?

(The witness does as requested.)

A. Mr. L. W. Hazlehurst receipted for these papers.

Q. He was the general agent of the defendant in Memphis, at that time?
A. Yes sir.

Plaintiff offers the aforesaid paper in evidence, which is marked Exhibit "E", and which is in words and figures as follows, to-wit:

77 EXHIBIT "E."

M. A. Goodlett. John Phillips.

Goodlett & Company,

Cotton Factors,

421-422 Falls Building.

Consignments solicited. Memphis, Tenn. 12/22/17.
Received from Goodlett & Co., Claim $6,882.40
Duplicate Account of Sales.
Original B/L No. C 195, dated November 3rd, Alligator, Miss., consigned by Nichols & Company to Goodlett & Co., Memphis, Tenn.

L. W. HAZLEHURST.

B. D. Bristol. F. C. A.
Chrg.

78 Q. Was, or not, this the original freight receipt that you delivered to him, marked Exhibit "B" to the testimony of one of the witnesses?
A. Yes sir.
Q. Was, or not, this the original bill of lading delivered to the railroad at that time, Exhibit "A"?
A. Yes sir.
Q. Did you, or not, afterwards receive any communication from the railroad company, this letter signed by B. D. Bristol, dated, Chicago, Illinois, April 1st, 1918?
A. Yes sir.
Q. Do you know who Mr. Bristol is?
A. He is the freight claim agent of the Y. & M. V. Railroad Company.

The aforesaid letter is introduced in evidence, is marked Exhibit "F", and is in words and figures as follows, to-wit:

79 EXHIBIT "F."

Form Y 1575.

The Yazoo & Mississippi Valley Railroad Company.

Chicago, April 1, 1918. R. P.
V-205456-29-H. A. F.

Mess. Goodlett & Co.
Memphis, Tenn.

Again referring to your claim December 22, 1917, filed for $1682.40 for the value of thirty-one (31) bales of cotton involved in fire at Alligator, Mississippi, on November 4th, 1917.

After investigation we have ascertained that the fire originated through no carelessness on the part of the carrier and that the cotton was still in possession of the consignor on a part of siding owned by J. C. Rainer of Alligator, Miss. The fire originated in the gin operated by the lessee of the gin, the property of J. C. Rainer fire occurring through no negligence on the part of this Company in view of which fact we cannot admit of liability.

Your claim therefore is respectfully declined.

B. D. BRISTOL,
F. C. A.

80 Mr. J. W. Cutrer reads Exhibit "F" to the jury.

It is agreed by counsel that the figure $1682.40 contained in Exhibit "F" is not correct, but is a typographical error, but that the correct figure is $6,682.40, being the amount of the claim filed, being the railroad company's file No. V205,455—54—A. W. G.

No Cross-Examination.

Plaintiff rests.

C. J. MARSHAL, a witness introduced for and on behalf of the defendant, having first been duly sworn, testified as follows, to-wit:

Mr. McKay: Please state your name?

A. C. J. Marshall.

Q. Were you the agent of the railroad company in Alligator, Mississippi in November 1917?

A. I was.

Q. Were you the agent there on November 3rd, 4th, 1917?

A: I was.

Q. Were you on duty those days?

A. Yes sir.

Q. Mr. Marshall, I hand you here, what has been introduced as the original paid freight bill on this particular car of cotton—will you explain that paper, and state what it is, Mr. Marshall?

A. That is a freight bill issued by Memphis, Tennessee, station upon receipt of the way bill.

Q. Mr. Marshall, does that freight bill show in the column headed "Rate", the charges assessed by you for the transportation of this particular car of cotton?

A. Yes sir; shows two rates.

Q. Two rates; please explain what those two items are?

A. The one rate of thirty three cents a hundred is the rate per hundred pounds on cotton to be transported. The 20 cents per hundred is for levee, Boliver County Levee Tax.

81 Q. Is that 33 cent rate applicable to compressed or uncompressed cotton?

Q. And the twenty cents is the State levee tax?

A. State levee tax?

Q. Is that, or not, collected by the railroad for the State of Mississippi?

A. Well, it is billed out, and the receiving agent, he handles the collection of it.

Q. So that the only freight charge for the actual transportation of the cotton is 33 cents per hundred pounds?

A. 33 cents?

Q. Mr. Marshall, were you at Alligator, Mississippi, on the afternoon of Sunday, November 4th, 1917?

A. Yes sir.

Q. Do you recollect the occasion or the destruction of Mr. Park's gin by fire on that afternoon?

A. Yes sir.

Q. Where were you, Mr. Marshall, when that fire broke out?

A. At home.

Q. When, if at all, did you first learn of the fire?

A. Not until I heard the reports of guns. I didn't really know what the guns were firing for until I ran down and then I saw.

Q. Where were you when you first learned exactly what the guns meant, and there was a fire at Park's gin?

A. I was at home, when I heard the guns firing, and came to town to see what it was.

Q. How long after you heard the guns firing, before you learned that it meant that there was a fire at Park's gin?

A. It was two or three minutes until I got up to the town proper.

Q. Please state, Mr. Marshall, whether or not there were any cars of freight standing on the spur track, or side-track leading to Mr. Park's gin at that time, to your knowledge?

82 A. Yes, sir; there was four, two at Park's gin, and two at the Rainer.

Q. What were the cars at the Park's gin?

A. Car load of coal, and car load of cotton.

Q. Was that the same car load of cotton involved in this law suit?

A. Yes, sir.

Q. State what, if anything, did you — upon learning that there was a fire at Park's gin, in an effort to save that car from destruction by fire?

A. I immediately went to the telephone and called up the operator at the Clarksdale office.

Q. Where did you go to the telephone?

A. Burbage & Company.

Q. Did you have a telephone in your station?

A. No sir.

Q. Was there any telephone nearer to you than the telephone at Burbage & Company?

A. That was the most direct line.

Q. What telephone was that? Railroad telephone?

A. Cumberland telephone.

Q. Who did you call?

A. I called one of the operators at the Clarksdale office here and explained the case to him.

Q. What did you ask him to do?

A. Asked him to get in touch with the chief dispatcher in Memphis over the wire and explain the case to him, to get an engine down here.

Q. What reply did he make to that?

A. He advised me that it would be quicker to direct with chief dispatcher at Memphis over the telephone.

Q. How long was it, Mr. Marshall, after you went to the telephone before you were able to get in communication with the operator at Clarksdale?

83 A. I got in direct touch with the operator at Clarksdale, with no delay.

Q. After that conversation with him, what did you do?

A. I immediately called Memphis over long distance telephone, over the same phone.

Q. How long did it take you to get connection with the chief dispatcher of the railroad at Memphis?

A. About five minutes to get his office.

Q. How long before you were able to talk to the chief dispatcher in person?

A. Fifteen minutes.

Q. Do you know his name?

A. No, sir; I do not.

Q. What conversation then took place between you and the chief dispatcher?

A. I explained to him that we had a fire at Alligator, which was endangering a couple of our cars. I explained to him that it was two cars of cotton bill of lading issued by the Y. & M. V. Railroad, and I figured it was Y. & M. V. property, and I asked him for an engine to switch them away from the fire?

Q. At what hour did you first talk over the telephone for the purpose of communicating with somebody about an engine?

A. The fire started between three and four, sometime. I went three or four minutes after I learned there was a fire. Sometime between the hour of three and four.

Q. Did you make any memorandum of the hour that you talked with the chief dispatcher?

A. I did at the time.

Q. Have you refreshed your recollection by referring to your memorandum?

A. I haven't the memorandum.

Q. Are you able to say, then, at what time you talked with the chief dispatcher at Memphis?

84 A. No, sir; not exactly. There should be a record on my files at the Alligator station.

Q. What is your best recollection about the time that you talked with the chief dispatcher at Memphis?

A. Somewhere around four o'clock. The fire was between three and four.

Q. Now, after you explained to the chief dispatcher about the fire, what did you ask him to do, if anything?

A. To send me an engine, to move the cars before they caught fire.

Q. What reply did he make to that request?

A. He advised me that he had a train listed out of Cleveland, Mississippi, and one out of Clarksdale.

Q. Did he tell you whether or not he could send you an engine immediately from either of these places?

A. No, sir; they were listed.

Q. What request, then, did you make of him about procurring an engine elsewhere?

A. Nothing. I knew those were my only points that I could secure an engine from.

Q. Did you ask permission to use any other engine in connection with the fire?

A. Yes; I asked permission to flag down passenger engine on train No. 48.

Q. What time was that train due at Alligator?

A. Due 4:35 at the time.

Q. Did he grant that permission?

A. Yes, sir.

Q. When this train 48 arrived at Alligator, did you flag it down, and catch the engine?

A. Yes, sir; I did.

Q. Were you able, at that time, with that engine, to save this car of cotton?

A. No sir; I was not. The car was in too bad condition, and I only pulled out the other two cars that were standing along side of the Rainer gin.

85 Q. Was the car on fire at that time?

A. Yes, sir.

Q. How much?

A. Pretty badly burning.

Q. But as I understand you, train No. 48 came through there too late for you to do anything for the car?

A. Yes sir.

Q. Now, do you recollect whether or not train No. 48 got in about on time that day?

A. Yes, sir; I think so.

Q. And about how long, in minutes, after your conversation with the chief dispatcher, was it before this train 48 came in?

A. I should judge twenty to twenty-five minutes, yes sir.

Q. And when it did get there, the car was so far gone that it could not be moved?

A. Could not be moved.

Q. Mr. Marshall, did you have any conversation with Mr. Calicut, of Alligator, about your telephone conversation in connection with this fire?

A. I don't recall whether I had it with him directly, or indirectly, I do recollect a conversation with some of the townspeople on Sunday night after the fire.

Q. Sunday after the fire?

A. Yes, sir.

Q. Were there any local freight trains passing Alligator on Sunday at all, at that time?

A. Not at the time; no sir.

Q. Was there any engine of the railroad company stationed at Alligator at the time of this fire?

A. No sir.

Cross-examination:

Mr. Cutrer: Mr. Marshall, you are familiar with the yard
86 of the Y. & M. V. Railroad Company at Clarksdale, at that time?

A. Clarksdale? Not altogether, no sir.

Q. You knew there was a switch engine here at work at that time?

A. I knew that they had a switch engine up here; yes sir.

Q. You knew this was a relay station, was it not?

A. Yes sir.

Q. And there were a good many engines here at that time?

A. Yes sir.

Q. Knowing that fact, and knowing it is only about twelve miles from Alligator to Clarksdale, you might call up the agent at Clarksdale?

A. No sir; the operator.

Q. Operator was in the employ of the railroad company?

A. Yes sir.

Q. And you asked him to send a switch engine down there?

A. No, sir; asked him to get in touch with the chief dispatcher to give him authority to send it.

Q. The yardmaster was authorized to send an engine out?

A. I don't know.

Q. Within three minutes after the fire, after you knew there was a fire, you were talking to the operator here?

A. Yes, sir.

Q. And told him that two car loads of cotton were burning?

A. Yes sir.

Q. Told him that the cotton had been received by you, and bill of lading issued?

A. Yes sir.

Q. You told him that they were property of the company, in

accordance with the way in which you had been handling business at Alligator since you had been there?

A. Yes sir.

Q. And told him that you wanted an engine down there
87 at once to save these cars from fire?

A. Yes sir.

Q. Did you ask to talk to the agent here?

A. No sir.

Q. Talk to the yardmaster here?

A. No sir.

Q. As a matter of fact, you knew that if the person in charge of the cotton could get right after it, there would be no trouble about saving the car?

A. Yes sir.

Q. And as far as your giving notice to the agent here, or operator, no engine was provided?

A. No sir.

Q. And I believe you stated that evening or the next day to Mr. Calicut, or others, that if you had gotten the engine there, the cars would have been saved?

A. Yes sir.

Q. That is your judgment, is it?

A. Yes sir.

Q. Now, instead of affording any relief by sending an engine here, this agent of the defendant or operator, told you you would have to talk to the train dispatcher at Memphis?

A. I asked for the train dispatcher.

Q. Who had authority to move trains?

A. I don't know whether the yardmaster could move them or not.

Q. You knew there was a telegraph line running from his office into the train dispatcher's office?

A. Yes sir.

Q. You knew that trains were hand-ed almost entirely that way, and that all the local office had to do to get in touch with the train dispatcher, and he refused to do it?

A. He told me it would take him too long to get Memphis for me, and advised me to call him over long distance telephone.

88 Q. Then, you know that there is no trouble for the operator to get him on the line?

A. No sir; I am not.

Q. You are the operator?

A. No sir.

Q. Don't you know it is no trouble for the operator to get in on the line, and get a message in emergency?

A. Unless, he is taking a train order.

Q. Train orders are short?

A. Sometimes they are pretty long, from what I have seen.

Q. Then, so far as you know, the operator here made no effort to communicate the fact of the peril of this property to the chief train dispatcher's office, and put you back on the Cumberland line to Memphis, Tennessee?

A. Yes sir.

Q. Then you did get the train dispatcher's office in about five minutes?

A. Yes sir.

Q. And talked first to the chief clerk?

A. Someone in the office.

Q. Was it the chief clerk, or not?

A. Didn't say.

Q. You didn't inquire?

A. No sir.

Q. After a little while, the chief train dispatcher talked to you?

A. Yes sir.

Q. And he said he had an engine listed for Cleveland, and one for Clarksdale?

A. Yes sir.

Q. What do you mean by the words "listed"?

A. I didn't know at the time exactly what listed meant.

Q. Don't know now?

89 A. Not clearly; I didn't have anything to do with the transportation end of the railroad.

Q. So, when he told you he had an engine listed from Clarksdale, and an engine listed from Cleveland, that is all you knew?

A. Yes sir; that left me under the impression that they had one here at Clarksdale that could be gotten out.

Q. You didn't know what it meant?

A. No sir.

Q. You didn't ask for an explanation?

A. I did not.

Q. You asked if this Peavine engine could stop?

A. Yes sir.

Q. What time was that Peavine due there?

A. 4:35.

Q. And they came in about on time?

A. About on time.

Q. And even coming in on time, got there in time to save some of the cars?

A. Yes sir; only the empties away from the fire at the Rainer gin.

Redirect examination.

Mr. McKay: Mr. Marshall, I understood you to say that these empties were pulled out by the Peavine were sitting at Rainier's gin?

A. Yes sir.

Q. How far distant is that from Park's gin?

A. About 100 feet from where the cars were standing?

Q. And was the switch engine able to pull any of the cars from Park's gin?

A. No sir.

Q. Why?

A. They were too badly burning.

Mr. Cutrer: I want to ask an original question: How long have you been agent at Alligator, before the 4th of November, 1917?

90 A. About eight months.

Q. About what assistance did you have at Alligator on November 3-4 1917?

A. Two; that is two clerks and one porter made three assistants.

Mr. McKay: Do you recollect whether either of these two clerks that you refer to were at Alligator on the Sunday afternoon of this fire?

A. They were not after train 48 got in.

Q. They came in on this train which got there too late?

A. Yes sir.

F. H. ANDERSON, a witness introduced for and on behalf of the defendant, having first been duly sworn, testified as follows, to-wit:

Mr. McKay: What is your name?

A. F. H. Anderson.

Q. What is your business?

A. Trainmaster Yazoo & Mississippi Valley Railroad.

Q. In what capacity were you employed in November, 1917?

A. Chief train dispatcher on the Memphis Division.

Q. Of the same railroad?

A. Yes, sir.

Q. Where was your office at that time?

A. Memphis, Tennessee.

Q. Please state the territory covered by the Memphis Division of the Y. & M. V. R. R. Company?

A. Memphis to Cleveland, Tutwiler to Yazoo City.

Q. Is that all, Mr. Anderson?

A. Well, there are some minor branches.

Q. Did the Memphis Division at that time include the territory between Clarksdale, Mississippi, and Alligator, Mississippi?

A. It did.

Q. Did it include both of those stations?

91 A. Yes sir.

Q. Did you have jurisdiction as chief dispatcher over the movements of trains in and about and between those two stations?

A. I did.

Q. Were you personally on duty at your office on Sunday afternoon November 4th, 1917?

A. I was.

Q. Please state whether or not, on Sunday afternoon you had any conversation by telephone, or otherwise, with Mr. Marshall at Alligator, at that time?

A. About 4:20 P. M. on Sunday afternoon, November 4th, Mr. Marshall called me on long distance telephone, and notified me that they had a fire in his station, gin house on fire, and a car of cotton

was burning, car of seed in danger, and other cars were on the same track in danger, and asked me to get an engine to him, to pull these cars away. The quickest engine I could get to him was the engine on the train already in route to pass Alligator, the train known as the Peavine. This train had already been out of Cleveland some forty or forty-five minutes, as near as I can recollect, and should reach Alligator in less time than I could get an engine from any other point. I arranged with him to stop this train there, and use their engine to pull the cars away, which was done.

Q. Did you, or not, tell Mr. Marshall that you had any engines or trains listed out of there, Clarksdale, or Cleveland, at that time?

A. I did.

Q. What was said in that regard?

A. I told them that we had a train listed to leave Cleveland for the North, and a train in route to Cleveland that would soon reach Clarksdale.

Q. Please explain, Mr. Anderson, just what you mean, in railroad parlance by the expression having a train listed out of the terminal?

92 A. There has to be a time set for the departure of all trains, and that is the time that the crew is called to report and leave with their train.

Q. As I understand, the expression "listed" does not mean that the engine is standing with steam up and crew on board, ready to move?

A. No sir.

Plaintiff objects.

Q. Do you recollect, now, the hours at which this train at Cleveland and this train approaching Clarksdale were listed to depart from those two points, in the direction of Alligator?

A. The time he called me on phone, the train to leave Cleveland was listed for 4:15 P. M. and the train coming South had not yet reached Clarksdale.

Q. The crew had already been called for the train listed to leave Cleveland at 4:15 had it?

Plaintiff objects to leading.

Q. Mr. Anderson, this Peavine train that you refer to, is the same as train No. 48?

A. Yes sir.

Q. At what time, if you recollect, was that train scheduled to pass Alligator in November 1917?

A. About 4:35 P. M.

Q. Do you recollect whether or not that train ran on time that day?

A. It was nearly on time.

Q. Mr. Anderson, where does the authority, that is, who has the authority to permit or direct the movement of engines or trains over the territory under your supervision?

A. The chief train dispatcher.

Q. Has any local agent, or any local yardmaster, or telegraph operator the authority to move trains over that territory?

Plaintiff objects to leading.

Question withdrawn.

93 Q. Who, if anyone, Mr. Anderson, besides yourself, had authority to initiate or direct the movement of engines or trains over that territory, and particularly between Clarksdale and Alligator, at that time?

A. The train dispatcher on duty in my absence.

Q. In your presence, when you are on duty, who besides you had authority to direct?

A. No one, except the superior officer.

Q. Was there any superior officer located at that time, either at Clarksdale, or Alligator?

A. There was not.

Q. How long had you been engaged in the transportation department of the railroad company service, Mr. Anderson?

A. Twenty-five years.

Q. Do you know the mileage, or the distance between Clarksdale and Alligator?

A. Eleven miles.

Q. Now, on that day, and at all times during that month, there was a regular switch engine at Clarksdale?

A. There was.

Q. Judging from your experience in the transportation department of the railroad company, please state how long, in your opinion, it would have required for you to have ordered that switch engine out of Clarksdale terminal, and for it to have traversed the eleven miles intervening and to have arrived at Alligator on that Sunday afternoon?

A. Well, it is difficult to say how long it would require, to get that started. Would depend on where we were working at the time we would send for them. We have no way of communicating with them direct at various portions of the yard. They might have been working the coal schute, or might have been down toward the Tallahatchie Compress.

94 Q. Give me your opinion on that subject, assuming, first that the switch was available, and then assuming that it was at the coal schute, and then assuming that it was at the Tallahatchie Compress?

A. Well, if it was at the coal schute, or the Tallahatchie Compress, it would take fifteen or twenty minutes to get them started. Switch engine is not equipped with pilot, what is generally known as a cow-catcher, and their speed in main line movements is restricted to fifteen miles per hour.

Q. Assuming, Mr. Anderson, that the switch engine had been available near the telegraph operator where he could communicate with it, how long ordinarily, in the usual course of business would it take to get a switch engine out on the road?

A. Well, it would take at least ten minutes if the switch engine

had been right there, and the crew constituting the engine and train of the switch engine were competent to run on the main line. Our yard engines are not at all times manned by engine men, and they are not men that are examined for main line running, but had they been manned by such a crew, it would have taken from five to ten minutes to get them started, and at a speed of fifteen miles per hours, four minutes to the mile, it would have taken forty-four minutes to run to Alligator.

Q. Now, Mr. Anderson, on this Sunday afternoon, were any other engines laying over, or passed Clarksdale?

A. Yes sir; there were engines at the round house.

Q. Were they, or not, prepared for immediate departure?

Plaintiff objects to leading.

A. I could not say as to what state of preparation these engines were in. They were not due out on their runs for eighteen or twenty hours, and it is logical to presume that they were——

Plaintiff objects.

Objection sustained.

Defendant excepts.

Q. Mr. Anderson, why didn't you, on this afternoon, order
95 out from Clarksdale, one of these engines that were lying over here?

A. The crews on these lay-over engines are excused from duty after their arrival. They were all on assigned runs. None of them due out before seven o'clock, the following morning, and it would have taken an hour to an hour and a half, to have assembled the crew to man one of these engines, and as the Peavine engine would get there much quicker, there was nothing to be gained by trying to run another engine to Clarksdale.

Cross-examination:

Mr. Cutrer: Mr. Anderson, at that time, Clarksdale was the terminal for several runs, was it not?

A. Yes sir.

Q. And there was, during the Fall, including the early part of November 1917 *quite* a number of trains passing North and South up and down the main line?

A. Yes sir.

Q. Well, now, at that time, there was an assistant yardmaster at Clarksdale, was there not?

A. There was a yardmaster here; I could not say as to an assistant.

Q. He was in charge of the handling of the engine in the yard, was he not?

A. Yes sir.

Q. He was in charge of the switch engine was he not?

A. Yes sir.

Q. And was also assistant train dispatcher here, was there not?

A. No sir.

Q. There was no one handling trains but you or your office?
A. Trains were all handled by the Memphis office.
Q. There was a straight wire connection with your office, was there not?
A. Yes sir.
Q. Are you a telegraph operator?
96 A. Yes sir.
Q. Was there, on November 4th, 1917, and reason why an operator on that wire could not communicate with your office?
A. None that I know of.
Q. So, if the telegraph operator in the employ of the defendant, on that wire, had desired to communicate with your office, there is no reason that you know of, why it could not have done so immediately?
A. None that I know of.
Q. Now, if, within four or five minutes after the fire was discovered, the telegraph operator here had undertaken to communicate with your office, he could have done so?
A. So far as I know, he could have.
Q. And if that communication had come to you within four or five minutes after the fire started, you could have exerted yourself at that time to have provided motive power to move the cars, could you?
A. Could not have gotten an engine there. Any quicker than the Peavine.
Q. You could have undertaken to do that?
A. I could not, and I would not have undertaken to get an engine out of Clarksdale.
Q. If upon receipt of notice of the fire, you had known there was a switch engine right at the station, there was no reason why you should not have run that engine out here, was there?
A. Yes sir.
Q. What was the reason?
A. Because we had another engine that would get there quicker.
Q. Assuming your facts to be true, I will ask you to do me the favor to assume that my facts are true, and answer my question. If, within three or four minutes after the fire had been discovered you had been informed of that fact, you would have exerted
97 yourself to have gotten an engine there at once, would you not?
A. Well, I have to answer your question by saying, I don't know as to what time the fire was discovered. All I know is the time I was notified there was a fire.
Q. Assuming that the notice had been given to you within three or four minutes after the fire had started, you would have exerted yourself, would you not, to have gotten an engine there?
A. I will have to know what time the fire was discovered; I don't know.
Q. Well, suppose the fire was discovered at 3:30?
A. No sir.
Q. You would not have exerted yourself.

A. I could not have gotten an engine there quicker than the engine on the Peavine.

Q. That would have been an hour and five minutes after you had known of the fire?

A. Yes sir.

Q. You had two switch engines at this time, did you not?

A. I am not positive as to to whether there was more than one working on Sunday.

Q. You had two switch engines operating here at that time?

A. Ordinarily, there were two.

Q. You don't know whether there were two operating that Sunday or not?

A. I could not say. It — customary on Sundays to cut off one switch engine, when the business warranted it.

Q. You knew the business warranted, at that time, the use of two switch engines, day and night?

A. During the week days.

Q. You know that the business warranted,—there was a congestion of freight—and that the switch engines were running day and night?

A. I don't know that.

98 Q. I understand your testimony to be, then, that you say a switch engine could have been gotten there forty to forty-five minutes?

A. After it started.

Q. If you had known that one hour and ten minutes before you did know it, you would have made no effort to get a switch engine there?

A. An hour and ten minutes before I did know it.

Q. Yes.

A. Well, that question has not been asked me before.

Q. I am asking it of you now?

A. That would have been 3:10, an hour and ten minutes before I was notified. I probably would have done so at 3:10.

Q. If you had been notified at 3:20, you would not have done so?

A. I might have done so.

Q. Don't you know, in order to save property, it was your duty to have done so?

A. No sir; my duty was to get the first engineer possible. My duty was to see that the first engine that could be possibly gotten there, was there to remove the cars.

Q. If you had known at 3:30 that a fire was there, and this property was in danger, you would have made no effort to get the engine there ahead of the Peavine?

A. I might have done so.

Q. I ask you if it would not have been your duty to try to do so?

A. If I could have gotten an engine there quicker than the Peavine, it would have been my duty.

Q. You say the distance from Alligator to Clarksdale is eleven miles?

A. Yes sir.

Q. Did you communicate with the depot, or with the operator at Clarksdale, at all?

A. No sir; not to my recollection.

Q. Well, now, was it or not, the duty of the operator here, upon being notified that there was a fire raging at your station, at Alligator, needing the services of an engine, to protect property in the charge of the railroad company, to have notified you of that fact?

A. I believe it was.

Q. Don't you know it? Don't believe about it; don't you know it was their duty to do that?

A. Well, if I believe it was my duty, it was the same as knowing it.

Q. You know the duty of the employee to his superior, don't you?

A. Yes.

Q. Was it his duty, or not?

A. It was his duty.

Q. I will ask you if it was not true that at that time, so far as you know, there was nothing to have prevented him from communicating that fact to you at once?

A. Not that I know of.

Q. You talk about the general rule about running switch engines along the main line, not over fifteen miles an hour,—the only difference between a switch engine and a work engine, so far as the motive power is concerned, is that a high speed engine can run a little faster than a switch engine?

A. There is a difference in the construction of the engines.

Q. The switch engine was capable of running twenty-five or thirty miles an hour, was it not?

A. No sir. The switch engine is not equipped with what is termed engine trucks under the front of the engine.

Q. Still it is capable of running twenty-five or thirty miles an hour?

A. Not a switch engine.

Q. Because there is no cow-catcher?

A. Because there is no engine trucks under it, and no cow-catcher to guard against striking stock, or anything.

Q. Then the chief difficulty was not being able to guard against the stock?

A. Not having the engine truck under the front part of the engine makes it easier to run that at a dangerous rate of speed.

Q. They frequently run them at a greater rate of speed, fifteen—to twenty-five miles an hour?

A. Not to my knowledge of a switch engine.

Q. In a case of emergency, the switch engine could not, with safety run over fifteen miles an hour?

A. Not in my opinion.

Q. You have never seen one run over fifteen miles an hour?

A. Not on the main line.

Q. Seen them running on the sidings?

A. Sidings? They are usually restricted to six or eight miles an hour.

Q. What do you mean by saying that you had never seen them run on the main line exceeding fifteen miles an hour?

A. We were talking about main line speed.

Q. Do you know who was the operator at that time?

A. No sir; I do not. I don't know who was the operator at that time.

Redirect examination.

Mr. McKay: You were asked on cross-examination whether or not you communicated with the Clarksdale operator, or whether or not he communicated with you, after you knew there was a fire at Alligator, and before you made any arrangement to take care of that fire—I will ask you to state, please, whether or not you were, at all times, informed of the position of trains on your Division?

A. Had my records in the office being made by the trick dispatcher, being made for my reference at any moment that I might wish to see them.

Q. It was unnecessary then, for you to communicate with anyone outside of your train sheets, to ascertain the position of all engines and trains? Was it not necessary for you to communicate with anyone to learn the position of trains on your Division?

101 A. It was not.

Q. Is there, or not, any rule of the railroad company with reference to the speed of switch engines on main line trains?

A. There is.

Plaintiff Objects.
Objection Overruled.
Plaintiff Excepts.

Q. Is there a rule?

A. There is.

Q. Please state whether that rule was enforced in November 1917?

A. It was.

Q. Please state what that rule was?

A. Well, the rule is rather lengthy, but it includes engines not equipped with engine trucks are restricted to fifteen miles per hour.

Defendant offers in evidence a certified copy of his Tariff, and a certified copy of his classification governing the transportation of uncompressed cotton from Alligator, Mississippi, to Memphis, Tennessee, in effect on November 3, 4, 1917. The certificate of the secretary of the Interstate Commerce Commission reading as follows: (Reading same to the Court and jury) marked Exhibit "I".

Plaintiff objects because it is not germane to the matters in this suit, because the certificate itself is incompetent, for the reason that the officers who undertook to certify to the contents of this paper and undertake to say what would be in force, and the said extracts therefrom having been in force on November 3, 1917, and it not being the function of any officer to give his opinion about any matter, but

simply to certify what appears in his office, and because the alleged schedules therein do not appear to have been and are not the papers referred to in the general rule No. 1, and because the contents of this paper are incompetent and immaterial to this issue, not affecting the liability of the plaintiff in this case.

The Court reserves the ruling.

Defendant Rests.

102 Plaintiff asks the Court to direct the jury to return a verdict for the plaintiff.

Defendant makes the same motion.

Objection to the defendants Exhibit "I" sustained. Defendant Excepts.

Plaintiff objects to Exhibit "I", further, on the ground that the alleged Tariff has not been posted, or published, or otherwise handled to give notice to the public in the manner required by law. Motion to direct a verdict for the plaintiff sustained.

Exhibit "I" is in words and figures as follows, to-wit:

103 EXHIBIT "I."

Interstate Commerce Commission.

Washington.

I, Geo. B. McGinty, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached (Consisting of four typewritten sheets) contain true and correct extracts from the schedules therein more particularly described, said schedules having been filed with the said Interstate Commerce Commission on dates specified in said papers, and the said extracts therefrom having been in force on November 3, 1917.

In witness whereof I have hereunto set my hand and affixed the seal of said Commission this 17th day of February, A. D. 1919.

GEO. B. McGINTY,
Secretary of the Interstate Commerce Commission.

Extracts from Southern Classification No. 43, W. R. Powe, Agent, I. C. C. No. 22, said schedule having been filed on February 17, 1917, and the said extracts therefrom having been in force on November 3, 1917.

Page IV:

List of Issuing Lines.

* * * * * * *

Illinois Central R. R. Co. ..... (FX1, No. 136)
Yazoo & Mississippi Valley R. R. Co. (The) ..... (FX1, No. 28)

* * * * * * *

Page 1:

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General Rules.

Rule 1.

104 [On margin:] Rates will apply only on property shipped subject to the conditions of the Carrier's Bill of Lading.

The rates governed by this classification were established on basis of bill of lading conditions limiting the liability of the carriers.

By an Act of Congress approved March 4, 1915 additional liability as to Interstate traffic has been imposed upon the carriers from and after June 3, 1915.

It is physically impossible to revise tariffs, classifications and exceptions sheets to conform to the requirements of the law as amended, and to become effective on June 3d.

Hence it becomes necessary to make some temporary provision applying to interstate tariffs that will remove doubt as to application of rates from and after June 3, 1915. To this end, rule 1 is revised to read as follows:

Section A.—All rates governed by this classification apply only on property shipped subject to the conditions of the carrier's bill of lading in use on and after June 3, 1915, and, except as otherwise provided herein, all interstate rates in force June 2, 1915, will continue in force on and after June 3, 1915, disregarding provisions in tariffs, classifications and exception sheets which limit the liability of carriers.

Section B.—Property carried not subject to the terms and conditions of the carrier's bill of lading will be at the carrier's liability, limited only as provided by common law and by the laws of the United States and of several States, in so far as they may apply, and property so carried will be charged at a rate ten per cent higher than the actual rates shown in published tariffs.

* * * * * * *

105 Extracts from the Yazoo & Mississippi Valley R. R. Co. Freight Tariff, I. C. C. No. 5115, said schedule having been filed on September 7, 1915, and the said extracts therefrom having been in force on November 3, 1917.

Page 29:

Section 1.

Rates of Freight.

Applying on Uncompressed Cotton to Go Through to Destination Uncompressed.

In Cents per One Hundred Pounds.

Index number.	From	*	To Memphis, Tenn.	*
*	*	Miss.	*	*
29	Alligator.....	"	33	
*	*		*	*

Extracts from Supplement No. 19 to the Yazoo & Mississippi Valley R. R. Co., Freight Tariff. I. C. C. No. 5115, said schedule having been filed on September 13, 1917, and the said extracts therefrom having been in force on November 3, 1917.

106 Title Page.

* * * * * * *

Governed, except as otherwise provided herein by Southern Classification No. 43, Agent W. R. Powe's I. C. C. No. 22 (The Y. & M. V. R. R. and I. C. R. R. No. 2-I), Supplements thereto and reissue thereof.

* * * * * * *

107 STATE OF MISSISSIPPI,
Coahoma County,
Second District:

In Circuit Court, February Term, 1919.

No. 5540.

NICHOLS & COMPANY

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

I hereby certify that the foregoing pages contain a true and correct transcript of my shorthand notes as taken down by me in the manner required by law in the above styled and numbered cause; and that I have this the 6th day of April, 1919, forwarded same by express to J. E. Montroy, Clerk of the Circuit Court of Coahoma County, at

Clarksdale, Mississippi, and that I have mailed notice of the same to the following attorneys: Messrs. Scott & Yerger, Clarksdale, Miss., and Mr. C. H. McKay, Exchange Building, Memphis, Tenn., attorneys for the defendant, and Mr. J. W. Cutrer, Clarksdale, Miss., attorney for the plaintiff.

JOHN C. SLIGH,
Official Stenographer, Eleventh Circuit Court, District of Mississippi.

Endorsed on the said stenographer's notes is the filing thereof, which said filing is in words and figures as follows, to-wit:

Filed April 4, 1919.

J. E. MONTROY,
Clerk.

108 *Plaintiff's Instructions as Asked and Given.*

The court instructs the jury to find for the plaintiff and assesses their damages at the value of the cotton with interest at the rate of six per centum per annum from November 4, 1917 and also the sum of $91.44 with interest at the rate of six per centum per annum from November 14, 1917.

Endorsed on said instruction is the filing thereof which said filing is in words and figures as follows, to-wit:

Given by the court.

J. E. MONTROY,
Clerk.
By W. D. LANDERS, *D. C.*

Defendant's Instructions as Asked and Refused.

The Court instructs the jury to return a verdict in favor of the plaintiff for $91.44 with interest thereon at 6% per annum from 14th day of November, 1917 to this date, and no more.

Endorsed on said instruction is the filing thereof, which said filing is in words and figures as follows, to-wit:

Refused by the Court.

J. E. MONTROY,
Clerk.
By W. G. LANDERS, *D. C.*

Thereupon, after having heard the argument of counsel and received the instructions of the court, the jury retired to consider their verdict and returned into open court the following verdict, to-wit:

"We the jury find for the plaintiff and assess their damage at the sum of $7,510.12."

Thereupon the court had the following judgment entered, to-wit:

109 STATE OF MISSISSIPPI.
County of Coahoma:

In the Circuit Court of the Second Judicial District.

NICHOLS & COMPANY

vs.

YAZOO & MISSISSIPPI VALLEY R. R. CO.

Judgment.

This day, the cause coming on to be heard, the parties being present in court in person and by their attorneys, came a jury of the regular panel of the week, and they, having heard the evidence, received the instructions of the court and heard the argument of counsel, retired to consider their verdict and returned into open court the following verdict, to-wit:

"We the jury find for plaintiffs and assess their damage at the sum of $7,510.12."

It is therefore ordered by the Court that the said Nichols & Company recover of and from the defendant, the Yazoo & Mississippi Valley Railroad Company, the sum of Seven Thousand Five Hundred and Ten and Twelve Hundredths Dollars ($7510.12) with interest at the rate of six per cent per annum from date, together with all costs in their behalf for all of which let execution issue.

110 In the Circuit Court for the Second District of Coahoma County, Mississippi, February Term, 1919.

NICHOLS & COMPANY

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Comes the defendant, the Yazoo & Mississippi Valley Railroad Company, by its attorney of record and moves the court to set aside the verdict of the jury herein and for a new trial, and for cause, assigns the following:

1.

Because the Court erred in sustaining objections made by the plaintiff to certain proof offered by the defendant, as shown in the stenographer's notes and record herein.

2.

Because the Court erred in overruling objections made by the said defendant to certain proof offered by the plaintiff, as shown in the stenographer's notes and record herein.

3.

Because the Court erred in granting the first and peremptory instruction asked by the plaintiff directing the jury to return a verdict in their favor for the full amount sued for, with interest thereon.

4.

Because the Court erred in refusing the first and only instruction asked by the defendant.

5.

Because the verdict of the jury is contrary to the law and evidence.

Wherefore etc.

D. A. SCOTT &
E. M. YERGER,
Defendant's Attorneys.

C. N. BURCH,
Of Counsel.

111 Endorsed on the back of said motion for new trial is the filing thereof, which said filing is in words and figures as follows, to-wit:

Filed 3/5/19.

J. E. MONTROY,
Clerk.

NICHOLS & COMPANY

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

The motion of the defendant to set aside the verdict of the jury and for a new trial herein having been heard and considered by the court, the same is hereby over-ruled, to which action of the Court, the said defendant then and there excepted.

It is further ordered by the Court that the official court stenographer shall transcribe and file the evidence taken in this cause within the time provided by law.

112 STATE OF MISSISSIPPI,
Coahoma County:

In the Circuit Court, Second Judicial District.

NICHOLS & COMPANY

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY.

Know all men by these presents, that we, the Yazoo & Mississippi Valley Railroad Company, as principal and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the said Nichols & Company in the penal sum of Fifteen Thousand & Twenty Dollars and Twelve Cents, ($15,020.12) for the payment of which, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Signed this the 19th day of March A. D. 1919.

The condition of this obligation is such that, whereas, at the February Term, 1919, of the aforesaid court, that judgment was rendered against the said Yazoo & Mississippi Valley Railroad Company, and in favor of the said Nichols & Company for Seven Thousand Five Hundred and Ten Dollars and Twelve Cents ($7,510.12) and all court costs upon which judgment, the Yazoo & Mississippi Valley Railroad Company has prosecuted an appeal to operate as a supersedeas to the next regular term of Supreme Court of the State of Mississippi.

Now, therefore, if the said Yazoo & Mississippi Valley Railroad Company shall promptly pay, satisfy and discharge, such judgment as may be entered against it by the said Supreme Court, last aforesaid, then this obligation shall be and become void, otherwise to remain in full force and effect.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY,
By E. M. YERGER,
Agent & Attorney in Fact.
UNITED STATES FIDELITY & GUARANTY COMPANY.
By J. A. MARTIN,
Attorney in Fact.

113 Endorsed on the back of said appeal bond is the filing thereof which said filing is in words and figures as follows, to-wit:

Filed 3/20/19.

J. E. MONTROY,
Clerk.

Notice to Stenographer to Transcribe Notes.

March 19, 1919.

Mr. Jno. C. Sligh,
Court Stenographer,
Cleveland, Mississippi.

DEAR SIR:

NICHOLS & COMPANY

vs.

YAZOO & MISSISSIPPI VALLEY RAILROAD.

We are today perfecting an appeal in the above case, to the Supreme Court, and we shall thank you to transcribe and file within the time required by law, the notes of evidence taken by you during the trial of said cause.

Yours very truly,

SCOTT & YERGER.

E. M. Y.-H.

Endorsed on the back of said notice to stenographer to transcribe notes is the filing thereof, which said filing is in words and figures as follows, to-wit:

Filed 3/20/19.

J. E. MONTROY,
Clerk.

114 STATE OF MISSISSIPPI,
County of Coahoma:

I, J. E. Montroy, Clerk of the Circuit Court in and for the County and State aforesaid, do hereby certify that the above and foregoing pages contain a full, true and accurate transcript of the record in the case of Nichols & Company, Plaintiffs, vs. No. 2540, Yazoo & Mississippi Valley Railroad Company, Defendant, as fully as the same appears of record in the Circuit Clerk's office in said County and State.

Given under my hand and official seal at Clarksdale, Mississippi, this the 9th day of April, A. D. 1919.

J. E. MONTROY,
Circuit Clerk, Coahoma County,
State of Mississippi.

115 In the Supreme Court of Mississippi.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, Appellant,

vs.

NICHOLS & COMPANY, Appellees.

On Appeal from Circuit Court of Coahoma County, Mississippi.

Assignments of Error.

I.

There is no evidence to support the verdict.

II.

The verdict is contrary to the law and the evidence.

III.

The verdict is against the preponderance of the evidence.

IIII.

The trial court erred in overruling defendant's objection to that part of the testimony of C. G. Calicut, a witness for plaintiffs, appearing in the record as follows, and in allowing the same to be heard and considered by the jury:

"Q. Did you, or not, see Mr. Marshall after the fire?
A. Well, I didn't talk with him any about the fire until Monday after the fire, Monday morning.
Q. Did you see him?
A. Yes.
Q. At what place Monday morning?
A. I saw him at the depot.
Q. What did he say to you as the reason why he had not gotten the cotton out?

Defendant objects to any conversation between Mr. Marshall and Mr. Calicut after the fire occurred.

At the request of Mr. Scott the jury retired while the court hears the evidence as to this conversation.

The Court: I will let him answer it.

116 A. Well, he said he had been too busy to bill it out. I just said to him Monday morning, 'Why didn't you get that cotton out of here Saturday evening'? He said, 'I was too busy to bill it out.'

Q. What, if anything, did he say to you about the refusal of the railroad company, at his request, to send a switch engine around there to take out the car?

A. Well, he told me, as soon as the fire started Sunday evening—which was the furthest point away from the cotton platform at the gin—that he telephoned to Clarksdale and asked for a switch engine, and if they had sent him a switch engine, he could have saved the car of cotton; but they did not pay any attention to his request.

Defendant objects.
Objection overruled.
Defendant Excepts.

The jury returns and the foregoing testimony taken in the absence of the jury is read to the jury by the stenographer."

V.

The trial court erred in excluding from plaintiff's objection the copy of the tariff and classification of defendant, duly certified by the Secretary of the Interstate Commerce Commission under the seal of the Interstate Commerce Commission, showing the rates on uncompressed cotton from Clarksdale, Mississippi, to Memphis, Tennessee, in effect at the time this shipment moved; the said tariff and classification showing the defendant had two rates on cotton, one ten per cent higher than the other, and that the lower rate attached and applied when the shipper shipped under the terms and conditions of the carrier's bill of lading, and that the higher rate attached and applied when the shipper refused to accept the terms and conditions of the carrier's bill of lading and demanded a common law bill of lading; the record showing as to this matter that the following transpired upon the trial:

117 "Defendant offers in evidence a certified copy of its tariff, and a certified copy of its classifications governing the transportation of uncompressed cotton from Alligator, Miss., to Memphis, Tennessee, in effect on November 3, 4, 1917, the certificate of the secretary of the Interstate Commerce Commission reading as follows: (Reading same to the court and jury.) Marked Exhibit 1.

Plaintiff objects because it is not germane to the matters in this suit, because the certificate itself is incompetent, for the reason that the officers who undertook to certify to the contents of this paper undertake to say what would be in force, and the said extracts therefore having been in force on November 3, 1917, and it not being the function of any officer to give his opinion about any matter, but simply to certify what appears in his office, and because the alleged schedules therein do not appear to have been and are not the papers referred to in the general rule No. 1, and because the contents of this paper are incompetent and immaterial to this issue, not affecting the liability of the plaintiff in this case. The court reserves a ruling.

"Objection to defendants Exhibit 1 sustained. Defendant excepts. Plaintiff objects to Exhibit 1 further, on the ground that the

alleged tariff has not been posted, or published, or otherwise handled to give notice to the public in the manner required by law."

VI.

The trial court erred in granting the plaintiff's motion for a peremptory instruction made at the close of all the proof.

VII.

The trial court erred in refusing to grant the defendant's motion for a peremptory instruction made at the close of all the proof.

CLINTON H. McKAY,
Attorneys for Appellants.

CHAS. N. BURCH,
H. D. MINOR,
Of Counsel.

118 I certify that I have this day sent by registered mail, postage prepaid, a copy of the foregoing assignments of error to Messrs. Cutrer & Johnson, Clarksdale, Mississippi, counsel for appellees.

Memphis, Tennessee, May 3, 1919.

CLINTON H. McKAY,
Attorney for Appellant.

119 Supreme Court of Mississippi, October Term, 1919, Monday, October 27th, 1919.

20795,

YAZOO & MISSISSIPPI VALLEY RAILROAD CO.

vs.

NICHOLS & CO.

This cause having been submitted on a former day of this term on the record herein from the Circuit Court of Coahoma County, 2nd District, and this Court having sufficiently examined and considered the same and being of opinion that there is no error therein, doth order and adjudge that the judgment of said Circuit Court rendered in this cause at the February term 1919, on March 5th, 1919, be and the same is hereby affirmed, and that the appellee do have and recover of appellant and The United States Fidelity & Guaranty Company, surety on the supersedeas bond the sum of seven thousand five hundred and ten & 12/100 dollars the amount of the judgment in the Court below, together with the further sum of three hundred and seventy five & 50/100 dollars being damages at the rate of five per centum, as allowed by law, as well as interest on

the amount of said judgment from date of rendition till paid at the rate of six per centum per annum; and also the costs of this cause in this Court and in the Court below to be taxed &c.

120 In the Supreme Court of Mississippi.

In Banc.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY

vs.

NICHOLS & COMPANY.

STEVENS, *J.:*

Appellees as plaintiffs in the trial court sued to recover the value of thirty-one bales of cotton delivered by them to appellant railway company at Alligator, Mississippi, to be transported and delivered to Goodlett & Company, Memphis, Tennessee. The record shows that W. B. & F. M. Nichols are partners in the cotton planting business and annually shipped their cotton over the lines of the defendant company, the only railroad company doing business at Alligator. Appellees, the owners of the cotton sued for, had their cotton ginned at Park's gin at Alligator. On the 2nd day of November 1917 they made application for a car and on the morning of Saturday, November 3, the car was placed and about noon of the same day loaded with the thirty-one bales of cotton. Plaintiffs procured a bill of lading from the agent at 1:30 P. M. and thereafter considered the cotton delivered to the carrier. The car was placed and the cotton was loaded upon a side track which leaves the main line of the railroad company about sixty feet south of the depot platform and runs in a southeastward direction along by Park's gin, approximately a distance of about one thousand feet. This side-track was originally constructed by appellant company under a written contract with Mr. J. C. Rainer, former owner of the gin. The contract is in evidence, bears date October 14, 1901, provides in brief that Mr. Rainer should furnish the right-of-way and that appellant would lay and construct the track and furnish all
121 needed material and thereafter be the owner of the track with the right to take up and remove the same, and that appellant furthermore is to have the "exclusive possession and the quiet and peaceful enjoyment thereof" as long as the agreement should be in force. It appears that this gin track and one other track referred to in the record as the "house track" extending along side the freight house where for many years the only tracks in the town of Alligator. Subsequently another track was constructed down by the gin of one Kline. There is evidence tending to prove that the Park's gin track and the railway company's house track along the depot furnished the facilities for handling incoming and outgoing freight and that between fifty and seventy-five per cent of all car load shipments were handled on the side track leading to Park's gin. That the shipping public used the gin track and to this end a track scale

was placed on this gin track. Appellees had no proprietary interest either in the gin or the side track upon which their cotton in question was loaded. The evidence further tends to show that the gin platforms held most of the cotton and that it was from the gin platforms that most of the cotton in Alligator was shipped. Park's gin is a public gin and the agent of the defendant company would honor the requisition of any shipper who desired to load or unload cotton at this gin. The car load of cotton sued for was destroyed by fire about 4:00 o'clock P. M. on Sunday, the day following the issuance of the bill of lading. There is evidence that a local freight train headed North passed Alligator between three and four o'clock Saturday afternoon after the signing and delivery of the bill of lading, but the evidence further tends to show that the local agent was busy in and about his duties and for that reason did not arrange to have the car pulled out and attached to that regular train. The fire originated in the gin but the evidence fails to show how or by whom it was started. It is fair to assume that the fire originated through no fault of either party to this suit. It spread
122 rapidly to the cotton platform, was communicated to the loaded car and the car and its contents were burned. There is evidence as to the efforts made by both parties to move the car to a place of safety and avert a loss, but the view which we take of the whole case renders it unnecessary to detail this testimony.

The uniform bill of lading was issued in this case and among other provisions contains the following paragraph:

"Property destined to or taken from a station, wharf or landing at which *their* is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, and when received from or delivered on private or other sidings, wharfs or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

There is no dispute as to the amount or value of the cotton sued for. The circuit judge instructed the jury peremptorily to find for the plaintiff for the value of the cotton as also the sum of $91.44 freight, and from the judgment rendered in pursuance thereof, this appeal was prosecuted.

On behalf of appellant it is contended in the main that the quoted stipulation in the bill of lading is valid and binding, is supported by a valuable consideration and provides a reasonable limitation of the carrier's liability in the premises: That the side track upon which the car was loaded is embraced in the phrase "private or other sidings" in section 5 of the bill of lading, that the track was a private siding within the meaning of the phrase, but if appellant is mistaken in this that the phrase is broad enough to cover this case.

For appellees it is contended that the quoted provision of the bill of lading has application only to those stations at which there is no regularly appointed agent, but if mistaken in this appellees contend that the side track is not one contemplated by the phrase
123 "private or other sidings", but in fact was a part of the terminal facilities of appellant company at the small station of Alligator,

It affirmatively appears that the defendant maintained at Alligator a regular freight agent and that most of the car load shipments were received from the siding in question. Whatever differences may exist as to the construction to be placed upon the quoted provision in the bill of lading, we prefer and adopt as the more reasonable view the construction which the Supreme Courts of California and West Virginia have placed upon this paragraph in the uniform bill of lading. Jolly vs. A. T. & S. F. Ry. Co., 21 Cal. Ap. 308, 131 Pac. 1057; McClure vs. Norfork & W. Ry. Co., (W. Va.) 98 S. E. 514. Under this view the paragraph should be construed as a whole and the phrase "at which there is no regularly appointed agent" should be held to qualify the last clause as well as the first clause of the provision. If there is a reasonable doubt as to the true interpretation to be given this clause of the bill of lading we are justified in construing the contract more strongly against the defendant. It will be observed that the paragraph is written and must be read as a whole and that the word "property" the first word used, is the subject of the entire paragraph; that the so called "last clause" of the provision is separated from the first by a comma and by proper grammatical construction this last clause in reference to property received or delivered on private or other sidings, wharfs or landings has application only to these places where there is no regularly appointed agent. As well stated by the Supreme Court of Virginia in the McClure case "the terms 'private or other sidings' in the last clause necessarily means private or public sidings, because all railroad sidings fall in one or the other class." The word "private" is contradistinguished from "public". It is difficult to conceive of a siding that might be termed semi-private or quasi-
124 private. The entire provision is designed to release carriers from liability at all places where there is no regularly constituted agent until the property has been received into the actual as distinguished from the constructive possession of the carrier and when delivered out of the actual possession of the railroad companies at such points. The first stipulation is to the effect that property taken from a station, wharf or landing at which there is no regularly appointed agent is at owner's risk until loaded upon cars, regardless of whether such property is received on a *main* or side track, and furthermore if received at private or other sidings in car load lots the same is at owner's risk at all places where there is no regularly appointed agent until the cars are attached to trains. Heavy freight such as cotton and lumber and indeed the greater portion of freight shipped in car loads must be received on sidings of some nature. The wholesale business of the nation is handled from side-tracks whether they be termed industrial switches, team tracks, or sidings. If then appellant's contention on this appeal is the true one, interstate carriers have successfully relieved themselves of all responsibility of theft, fire or damage to the bulk of the freight handled in car load shipments, except only when regular trains have been made up for regular movements between trains, and furthermore under such view a large per cent of the shipping public, having no proprietary interest in sidings and no opportunity to protect car load shipments consigned by or to them, are without protection. The

quoted provision refers as much to property delivered on "private or other sidings" as property received. It is a matter of common observation that consignees do not know and cannot know the exact time of arrival of freight consigned at a particular station or siding, and frequently have to be notified by a local agent of the arrival and placing of the car. If the mere placing of a consigned car on a side-track exempts the carrier from further liability then railroad companies have an easy way of discharging their
125 common law duty safely to transport and deliver freight.

In the present case the testimony shows that appellees have no proprietary interest in the gin track and therefore had no control over the car after it had been loaded and the bill of lading issued. Prima facie the issuance of a bill of lading is an acceptance of the freight and upon receiving the bill of lading under circumstances disclosed by the present record the shipper would ordinarily go about his business and leave the protection of the car to the carrier. But there are many instances where railroad companies in an honest effort to serve the public agree to receive, or take up, and to deliver freight at flag stations and at other points on the main line where there is no regularly appointed agent and sometimes upon sidings where there is no agent. At such places it is reasonable for the carrier to limit its liability for property received or delivered in accordance with what he believed to be the proper construction of the lading here under review. As stated by the Supreme Court of West Virginia "there is as much if not more danger that property not loaded into cars would be destroyed or carried away, than there is after it has been loaded, and therefore no reason for making the distinction contended for by counsel for defendant in the application of the provision."

Affirmed.

126 STATE OF MISSISSIPPI,
Hinds County:

I, Geo. C. Myers, Clerk of the Supreme Court of the State of Mississippi, being the Court of said State which has the highest, last and final jurisdiction of all pleas and causes pending in the Courts of said State, do hereby certify that the foregoing are true and correct copies of the papers, each and all of them, constituting the record in the said Supreme Court in the case of Yazoo & Mississippi Valley Railroad Company versus Nichols & Company, No. 20,795 on the docket of said Court, as the same appear of record on file in said Court.

Given under my hand with the seal of said Court affixed at office in the City of Jackson, Mississippi, this the 21st day of November A. D. 1919.

[Seal Supreme Court, State of Mississippi.]

GEO. C. MYERS,
Clerk of the Supreme Court of Mississippi.

127 In the Supreme Court of Mississippi, October Term, 1919.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et al.

vs.

NICHOLS & COMPANY.

In this cause it is agreed by the parties hereto that the certified transcript of record now on file in this cause in the Supreme Court of the United States shall be taken as a return to the writ of certiorari issued by the Supreme Court of the United States in this cause on January 28, 1920; and that the Clerk of the Supreme Court of Mississippi, to which court said writ of certiorari is addressed, shall not be required to file with the Clerk of the Supreme Court of the United States another certified copy of the record and proceedings in this cause, but that the Clerk of the Supreme Court of Mississippi shall file with the Supreme Court of the United States only a certified copy of this stipulation, the same to be a return to said writ of certiorari.

This January 30, 1920.

YAZOO & MISSISSIPPI VALLEY R. R. CO.,
By CHAS. M. BURCH, *Attorney.*
UNITED STATES FIDELITY & GUARANTY CO.,
By CHAS. M. BURCH, *Attorney.*
NICHOLS & COMPANY,
By JOHN W. CUTRER, *Attorney.*

128 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Mississippi, Greeting:

Being informed that there is now pending before you a suit in which The Yazoo & Mississippi Valley Railroad Company is appellant, and Nichols & Company is appellee, which suit was removed into the said Supreme Court by virtue of an appeal from the Circuit Court of Coahoma County, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Supreme Court, and removed into the
129 Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-eighth day of January, in the year of our Lord one thousand nine hundred and twenty.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

No. —.

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY et al.

vs.

NICHOLS & COMPANY.

The record and all proceedings whereof mention is within made, having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Given under my hand and Seal of the Supreme Court of Mississippi at office in the City of Jackson, this the 23rd day of February, 1920.

[Seal Supreme Court, State of Mississippi.]

W. J. BURCH,
Clerk of the Supreme Court of the State of Mississippi.

130 [Endorsed:] File No. 27,410. Supreme Court of the United States. No. 655, October Term, 1919. The Yazoo & Mississippi Valley Railroad Company et al. vs. Nichols & Company. Writ of Certiorari. Filed Feby. 17, 1920. W. J. Buck, Clerk.

131 [Endorsed:] File No. 27,410. Supreme Court U. S. October Term, 1919. Term No. 655. The Yazoo & Mississippi Valley Railroad Co. et al., Petitioners, vs. Nichols & Company. Writ of certiorari and return. Filed February 26, 1920.

In the Supreme Court of the United States.

No. 655.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and UNITED STATES FIDELITY & GUARANTY CO.

vs.

NICHOLS & COMPANY.

In this cause it is agreed that there was filed in the Circuit Court of Coahoma County a blue print as an exhibit to Exhibit C, which is set out on page 36 of the printed record in this court, but that said blue print, through inadvertence, was not sent with the record in this cause to the Supreme Court of Mississippi, and it is now agreed that said blue print, a copy of which is attached hereto, may be considered by this Honorable Court on the hearing of this cause.

This February 11, 1920.

CHAS. N. BURCH,
Attorney for the Yazoo & Mississippi Valley R. R. Co. and United States Fidelity & Guaranty Company.

JOHN W. CUTRER,
Attorney for Nichols & Company.

(Here follows blue print.)

[Endorsed:] File No. 27,410. Supreme Court U. S., October Term, 1910. Term No. 655. The Yazoo & Mississippi Valley R. R. Co. et al., Petitioners, vs. Nichols & Company. Stipulation and addition to record. Filed April 19, 1920.

No. 6[redacted]216

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, and THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
Petitioners,
vs.
NICHOLS & COMPANY,
Respondents.

CHARLES N. BURCH,
H. D. MINOR,
C. H. McKAY,
Attorneys for Petitioners.

BLEWETT LEE,
Of Counsel.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

LATTA & ARNOLD · MEMPHIS

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OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, and THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

vs.

NICHOLS & COMPANY, Respondents.

PETITION FOR WRIT OF CERTIORARI TO BE ADDRESSED TO THE SUPREME COURT OF MISSISSIPPI AND BRIEF IN SUPPORT THEREOF.

Petitioners, The Yazoo & Mississippi Valley Railroad Company and the United States Fidelity & Guaranty Company, respectfully state that they are greatly aggrieved at the affirmance of a judgment by the Supreme Court of Mississippi against petitioners and in favor of respondents, Nichols & Company, in the sum of $7,510.12 (together with damages, interest and costs), said judgment having been originally rendered in the Circuit Court of Coahoma County, Mississippi, and petitioners now pray this Honorable Court for a writ of certiorari, so that said judgment may be reviewed and reversed.

Your petitioners respectfully show that this suit was brought in the Circuit Court of Coahoma County, Mississippi, on July 26, 1918, to recover the value

of 31 bales of cotton which had been loaded by the respondents for shipment over The Yazoo & Mississippi Valley Railroad from Alligator, Mississippi, to Memphis, Tennessee.

The cotton involved in this case was destroyed by fire, without negligence on the part of the railroad company, on November 4, 1917, after a bill of lading had been issued by the railroad company and after the cotton had been loaded into a box car on a side track serving a cotton gin, but before the car containing said cotton had been removed from said side track.

The declaration of the plaintiff merely alleged the breach of defendant's duty as a common carrier to deliver said cotton to the consignee at Memphis, Tennessee.

Defendant relied in its defense upon the last clause of section 5 of its bill of lading, reading as follows:

> "*Property* destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, *and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's rick until the cars are attached to and after they are detached from the trains.*"
>
> (Original Record, p. 30.)

The portion of the bill of lading relied upon by the railroad company for exemption from liability is that shown in the italics in the above excerpt.

The bill of lading involved in this case is what is known as the uniform bill of lading, which has the

approval of the Interstate Commerce Commission, the same having been recommended by the Interstate Commerce Commission for adoption in the case entitled "In the matter of Bills of Lading," 14 I. C. C., page 346.

This is also the bill of lading referred to in the tariff and classification of the railroad company filed with the Interstate Commerce Commission. (Original Record, 103, et seq.)

The respondents shipped their cotton under this uniform bill of lading at a reduced rate, *but* respondents, under the tariff (original record, p. 104), could have shipped their cotton at a higher rate, and under a bill of lading "limited only as provided by common law and by the laws of the United States and of several States in so far as they may apply."

Petitioners further show that the town of Alligator, Mississippi, is a small station on the line of the Yazoo & Mississippi Valley Railroad at which an agent is maintained, and that there is a spur track leading from the main line of the railroad at said station and extending for a distance of about one thousand feet to a cotton gin (Rec. 62). This side track was constructed under a contract with one Rainer (Orginal Rec. p. 56) and served two cotton gins, and was also frequently used for the loading and unloading of general carload freight. The material in this side track belonged to the railroad company, but the land upon which the portion of the spur track, where the car was burned, rested, was private property. (Original Rec. p. 55.)

Petitioners further show that the cotton involved in this case was ginned and prepared for shipment

at the cotton gin at the end of said side track and was loaded by respondents into a box car from the platform of the cotton gin. (Original Rec. p. 34).

The car had been placed at the cotton gin on Saturday, November 3, 1917, and the loading of the car was completed about one o'clock of that day, and the bill of lading had been issued therefor by the agent at Alligator about 1:30 P. M. of the same day. (Original Rec. p. 34.)

The cotton was destroyed by fire on the following day (Sunday), November 4, 1917, at about four o'clock P. M., by the spreading of a fire originating in the gin, and *before the car had been attached to any engine or train* or in any way moved from said side track, or from the place where it was loaded. (Original Rec. pp. 32-34.)

Petitioners further show that on the trial of said cause in the Circuit Court of Coahoma County petitioners relied for exemption from liability on the clause in the bill of lading above referred to, in as much as the car containing the cotton *had not been attached to any train.* Respondents (plaintiffs in the Circuit Court) denied the validity of said clause of the bill of lading. However, the Supreme Court of Mississippi in deciding the case, held in substance that the clause in the bill of lading above referred to was valid, but the Supreme Court of Mississippi construed said clause *not to be applicable to the instant case* as the proof showed that the railroad company had a regularly appointed agent at Alligator. In other words, the Supreme Court of Mississippi held that there should be read into and interpolated into the last clause (above referred to) the words "at which there is no regular appointed agent," and that said words "at which there is no regularly appointed agent," which appear in the

first clause of the above excerpt from the bill of lading were also a part of and to be read into the second clause of said bill of lading. Your petitioners now respectfully show that this construction of the bill of lading by the Supreme Court of Mississippi is erroneous and denies petitioners a right or immunity claimed by petitioners under the statutes of the United States, and particularly under the Act to Regulate Commerce, as amended. Your petitioners further show that the Supreme Court of Mississippi based its opinion (reported in 83 Southern Reporter, p. 5), (Original Rec. p. 120), entirely on the said construction of said clause of the bill of lading. Your petitioners further show that this paragraph of the uniform bill of lading has been passed upon by the highest courts of several states and that there is a diversity of opinion among the state courts as to the proper meaning and effect of this paragraph of the uniform bill of lading. The supreme courts of Mississippi, California and West Virginia hold that the clause above referred to grants exemption from liability *only at non-agency stations*, whereas the Supreme Court of New York and also the Court of Appeals of New York and the highest courts of New Jersey, Vermont and Arkansas allow exemption from liability (as to loaded cars not yet attached to trains) without regard to whether *the station* is an agency or a non-agency station, as will be shown hereafter in the brief.

Petitioners further show that the question as to whether at agency stations, the last clause of the above paragraph of the uniform bill of lading gives to carriers exemption from liability as to loaded cars for which a bill of lading has been issued, but which have not been attached to trains, is a matter of great importance to shippers and carriers, and that the proper construction of said paragraph of the bill of lading can only be authoritatively determined

by this Honorable Court. Only by a decision of this Honorable Court can a uniform construction of said bill of lading be attained, and only thereby can shippers and carriers be definitely advised as to their rights and liabilities.

SPECIFICATION OF ERRORS.

Your petitioners now aver that the following plain errors were committed by the Supreme Court of Mississippi in rendering the judgment complained of against petitioners, and thereby petitioners were denied rights, privileges, and immunities secured to them by the Act to Regulate Commerce as Amended, in the following respects:

1. The Supreme Court of Mississippi erred in holding that the clause in the bill of lading aforesaid, applied only at stations at which defendant had no regularly appointed agents.

2. The Supreme Court of Mississippi erred in this, that the clause in said bill of lading relied upon by defendant was construed by the Supreme Court of Mississippi not to apply except at stations at which defendant had no regularly appointed agent, contrary to its manifest words and intent.

3. The Supreme Court of Mississippi erred in holding that, under the Act to Regulate Commerce as Amended, the tariffs and bill of lading aforesaid, and the common law rules accepted and applied by the Courts of the United States, the defendant was liable for the destruction of said cotton by fire while it remained on the private siding at the gin at which it was loaded, when said fire originated in the gin without negligence of defendant, and without negligence of defendant in exposing the cotton to the fire, and without negligence of defendant in its at-

tempt to rescue the cotton from the fire, after the fire was discovered.

4. The Supreme Court of Mississippi erred in holding that the trial judge did not err in directing a verdict for plaintiff.

5. The Supreme Court of Mississippi erred in holding that the trial judge did not err in refusing to give respondent's (defendant's) request for an instruction that plaintiffs were entitled to recover the freight charges of $91.44 and interest thereon and "no more." (Original Rec. p. 108.)

Petitioners further show that the judgment complained of was rendered by the Supreme Court of Mississippi (the highest court of the State and the highest court of the State therefore to which this cause could be taken) on October 27, 1919, and thereupon became final.

PRAYER.

Your petitioners now pray that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of the State of Mississippi and the Judges thereof commanding the said Court to certify and send to this Court a full and complete transcript of the record and all the proceedings of said Supreme Court of Mississippi in this cause, entitled The Yazoo & Mississippi Valley Railroad Company vs. Nichols & Company, No. 20795 on the docket of said Supreme Court of Mississippi, to the end that this cause may be reviewed and determined by this Court, and your petitioners pray that they may have such other and further remedies and relief in the premises as to this Court may seem appropriate and in conformity with law, and that the judgment of the said Supreme

Court of Mississippi in this cause and every part thereof be reversed by this Honorable Court, and your petitioners will ever pray.

This is the first application for a writ of certiorari in this cause.

CHARLES N. BURCH,
H. D. MINOR,
C. H. McKAY,
Attorneys for Petitioners.

Charles N. Burch, being duly sworn, makes oath that he is one of the counsel for petitioners in the above case and that he prepared the foregoing petition and that the allegations therein are true as he verily believes.

CHARLES N. BURCH.

Subscribed and sworn to before me this 16th day of December, 1919. My commission expires January 17, 1923.

(SEAL) E. C. TURNER,

Notary Public for Shelby County, Tennessee.

In my opinion the foregoing petition is well founded in law.

CHARLES N. BURCH,
Attorney for Petitioners.

IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Petitioners,

vs.

NICHOLS & COMPANY, Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

May It Please the Court:

As will be seen from the foregoing petition for certiorari this case involves the construction, meaning and effect of the following paragraph in the uniform bill of lading:

> "*Property* destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, *and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.*"
>
> (Original Record, p. 30.)

We shall attempt to show that the Supreme Court of Mississippi has placed a totally unnatural and erroneous construction on this paragraph. The Supreme Court of Mississippi in its opinion found that the cotton was destroyed by fire without negligence on the part of the railroad company and bases its conclusion of liability of the defendant railroad company entirely on the construction which it has given to the last clause of the above paragraph. It is our purpose to show that the paragraph does not mean and cannot mean what the Mississippi Supreme Court has declared that it does mean.

It is true that the word "property" in the quoted paragraph of the bill of lading is the subject of the verb "shall be" in both the first and second clauses; but the first and second clauses refer to totally dissimilar and distinct conditions. It is our contention that the keynote to the proper construction of this paragraph is to be found in the word "private" (as used in the second clause). In other words, it is our contention that the word "private," as used in the second clause and as applicable to the words "wharves or landings," is thereby intended to differentiate the wharves or landings referred to in the second clause from the wharves or landings referred to in the first clause. That is, it is our contention that the first clause refers to a *public* station, wharf or landing; and that the second clause refers to private wharves or landings and private sidings, and also to all other sidings, whether the same be quasi-private or public, or quasi-public, *but not including* those public side tracks which are *immediately adjacent to* and serve a public *station*, and from which freight is unloaded into a public depot or loaded from a public depot into cars on such public sidings. In other words, the words "private or other sidings" do not include *side tracks*, *team tracks*, or *house tracks* immediately adjacent

to a freight house, that is, those tracks which *are an integral part* of the public freight house facilities. The last mentioned sidings are included in the term "station" in the first clause, as such tracks are as much a part of the station as the station platform. To make the matter clearer, it appears from this record that there is what is called a house track which is immediately parallel with and adjacent to the freight depot and platforms (Original Rec. p. 20) (Blueprint, p. 58). Of course a railroad could not properly provide that it would not be responsible for goods loaded into a car (when such car was standing on a public side track immediately adjacent to the freight house) until such car had been attached to a train.

Furthermore, at a station *where an agent is maintained*, the railroad becomes responsible as soon as goods are deposited on the freight house floor or platform, and bill of lading is issued, or if not deposited on the freight house floor, just as soon as the goods are placed in a car which is on a track *which serves the freight house*, and bill of lading is issued.

We insist, therefore, that the whole paragraph, according to its true intent and meaning, should be construed as if it read as follows:

"Property destined to or taken from a *public* station, wharf, or landing, at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings (*said other sidings not including those siding which are an integral part of public freight house facilities*) *private wharves*, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

The words in italics are inserted by the writer of this brief. The rest of the language is just the same as it appears in the bill of lading.

Looking now to the first clause of this paragraph it means that if a carrier has a public station, wharf or landing, at which the carrier does not maintain a regularly appointed agent, then in such event, the carrier shall be responsible until inbound goods are unloaded from the cars, and as soon as outbound goods are loaded into cars.

The second clause means that when a party receives or delivers goods not at a regular freight house, or not at a track serving the regular freight house, but on a private or other siding, then in such event the liability of the carrier as a common carrier shall not begin until (as to outbound freight), the loaded cars are attached to trains, and as to inbound freight the common carrier's liability shall cease when cars are detached from trains.

We are concerned here with outbound freight and will give some further attention to that feature.

Looking then to the feature of outbound freight, we insist that where the shipper loads his own freight, as is the case here, and loads it at a *public* station, wharf, or landing, at which there is no regularly appointed agent, the liability of the common carrier under the first clause attaches as soon as the goods are loaded into a car and w;e further insist that when a whipper *does not choose* to load his freight at a regular public freight house, but on the other hand *chooses to load his freight at a private wharf* or private landing or on any kind of a side track (which does not serve a public freight house), then in such event the liability of the common carrier does not attach until the car containing such goods is attached to a train.

It is well known that a railroad agent works in the freight house or station building, and it is entirely reasonable to expect him to supervise and take care of all property in the station building and all property on tracks immediately adjacent to the station building, which are an integral part of station building facilities. But it is not reasonable to expect the station agent to have supervision of and to take care of property in cars on side tracks which are not immediately at a station building, but which are some distance therefrom, and particularly when the side track is located on land not belonging to the railroad company. For instance, in every large city there is an agent at the freight house for the receipt of outbound freight, and this agent, either personally or through his assistants, is in a position to see and to take care of the freight delivered in his freight house for outbound shipment, or to load it into cars which are on tracks immediately adjacent to the freight house, but such agent could not be expected to see and take care of cars loaded on all the private sidings of all the warehouses and industries of such city, or even on public sidings which are not immediately at and adjacent to his freight house. Of course the Court judicially knows that a large part of the tonnage of the country is loaded into cars which are on tracks quite remote from the place of business of the local station or depot agent. As to such cars the railroad company has a right to insist that its liability as a common carrier shall not begin until such cars are attached to trains. *No one is required to load his freight on a private side track or a public side track remote from the regular depot.* A shipper has the right if he chooses to deliver his freight at *the regular freight depot* or to load it into cars placed immediately adjacent to the regular freight depot. If the shipper *for his own convenience* elects to load his cars at some other point, then certainly the carrier has a right to say

that, in such event, the carrier's liability as a common carrier or insurer, shall not begin until the cars are attached to a train—in other words, until the cars are in the actual, as distinguished from the constructive possession of the carrier.

This brings us to a discussion as to the true character of the track upon which the cotton in this case was standing when destroyed by fire.

CHARACTER OF THE SIDE TRACK.

The record shows that there is a station or depot at Alligator at which the agent of the carrier transacts business. The record further shows that there is a public side track, known as the house track, immediately adjacent to the station or depot. The car of cotton involved in this case was not loaded on this house track. If it had been loaded on this house track we would not deny liability.

The track involved here begins at a point about sixty feet south of the depot platform and extends in a southeasterly direction on a curve for a distance of one thousand feet to the gin, at which the cotton involved in this case was loaded. This track was built by the railroad company under a contract bebetween the railroad company and one J. C. Rainer (Original Record, p. 56). The contract provides that whereas J. C. Rainer was engaged in business at Alligator and "in order to facilitate the carrying on of *his* business, desires to have a spur or side track constructed, connecting with one of the tracks of the party of the first part (the railroad company)," it is therefore agreed that Rainer shall furnish to the railroad company the ground needed for the construction of the side track, so far as the same should extend beyond the right of way and grounds of the railroad.

It was further agreed that the railroad company should construct the track and furnish all the track material. It was also agreed that the railroad company should be the owner of all the track material and that the track material should remain personalty and should not become a part of the realty, and that the railroad company should have sole control of the side track and that the railroad company should have the right to take it up at any time in its discretion on thirty days' notice to Rainer, and it was further agreed that the agreement was to be binding on both Rainer and the railroad company and their successors.

From this contract and from the record it is clear that the railroad company did not own the land (beyond its right of way) on which the track was built. It merely used only so much of the land as was necessary for the construction of the track beyond the right of way line. Rainer and his successors in title owned and still own the land on which the track is laid immediately adjacent to the cotton gin.

It will be seen from this contract that the track was built at the instance of Rainer "to facilitate the carrying on of *his* business"—his business being the operating of a gin for hire. Rainer, before the bringing of this suit, had sold his gin to one Parks and had built another gin on this same side track somewhat nearer to the station. It is true that this track while serving these gins was also used to a considerable extent by the railroad company for the loading and unloading of a large portion of the carload freight handled at Alligator.

In the opinion of the Supreme Court of Mississippi it is said:

"There is evidence tending to prove that the Parks gin track and the railway company's house track along the depot furnished the facilities for handling incoming and outgoing freight, and that between 50 and 75 per cent. of all carload shipments were handled on the side track leading by Parks' gin; that the shipping public used the gin track, and to this end a track scale was placed on this gin track."

This statement of the Supreme Court of Mississippi is to be read in the light of the uncontradicted fact that the *track scale* was not installed by the railroad company, but was installed by Rainer, Parks and Kline. The record on this is as follows:

"Mr. Cutrer: One original question: Mr. Rainer, in reference to this side track, I omitted to ask you whether or not the railroad company had put in a track scale on that track?

A. The railroad company has not put in a track scale. Mr. Park and Mr. Kline and myself have put in the track scale, and it is used by the town in the way of car load stuff that come in there. We weigh out all our seed, and weigh in car loads of hay and grain.

Q. Is that, or not, the only track scale used by the railroad company at Alligator?

A. Yes, sir.

Q. I will ask you to state to the jury whether

or not the railroad company has continuously since that scale was put in there, used it in the settlement of freight coming in and going out?

A. I don't—I could not say. My bookkeeper has been doing that.

Q. I will ask you to state whether or not it has been used in connection with the business of the railroad company at that point?

A. They make a switching charge, and weighing the cars.

Mr. McKay: And that scale belongs to Mr. Park and you and Mr. Kline?

A. That was put in at our expense. The railroad did the work; but we paid the railroad for it." (Original Rec. pp. 58-9.)

The car in which the cotton was loaded in this case was placed by the railroad company on the track opposite the gin at the request of the shipper (Original Record, pp. 33-34). The shipper did not request the car to be placed on the house track immediately in front of the freight station. This was evidently for the shipper's convenience, as it was apparently easier for the shipper to load the cotton at the gin than to haul it from the gin to the freight station platform, or load it into a car on the house track. The loading of the car was done by the shipper (Original Record p. 21).

The agent of the railroad company issued a bill of lading upon the statement of the shipper that the car had been loaded (Original Record, p. 23).

The plaintiffs, having elected to do their own loading at the cotton gin, and not haul the cotton to the freight house, thereby become bound by the stipulation in the bill of lading, which provides, in substance, that the liability of the railroad company

did not begin until the car containing the cotton should be attached to a train. This was entirely reasonable as it could not be expected that the company would assume liability as an insurer for a car of cotton only constructively in its possession, when it was not located immediately adjacent to the freight house where the agent could watch and check the loading of the cotton and take care of it, but which was located over one thousand feet away on private property at the end of a side track adjacent to the cotton gin.

THE JUDICIAL DECISIONS CONSTRUING THE CLAUSE OF THE BILL OF LADING IN QUESTION ARE CONFLICTING.

In the case of Siebert v. Erie R. R., 163 N. Y. Supp., 111, a car was robbed. Said the court:

> "The loss in the present case occurred while the silver was in the car upon a siding adjacent to the works of Ledoux & Co., and before the said car had been attached to a train."

The report of the case shows that the agent of the railroad company "went into the car, counted the bags and sealed the car." In other words, while the court does not stress the fact, yet it does appear from the report of the case that the car was loaded on a side track and that the railroad company had an agent at the station (Bergen Junction) and that the agent went into the car, counted the bags of silver and sealed the car.

The identical paragraph in the bill of lading was relied on by defendant, as in the instant case. The New York Court, without going into any elaborate discussion of the matter, held that as the car had not been attached to a train the defendant had a complete defense to the action.

In the above case it does not appear what the distance was from the station (Bergen Junction) to the works of Ledoux & Co., where the car was loaded. But the whole inference from the opinion is that the car was loaded on a side track used by Ledoux & Co. and not on a side track which was an integral part of the freight house or depot facilities.

In the case of Bers v. Erie Railroad Company, 163 N. Y. Supp., 114, the same paragraph of the uniform bill of lading was under construction. The merchandise was loaded at Passaic, New Jersey, "upon a siding in front of the shipper's warehouse." As to the character of the side track the New York Supreme Court said:

> "The character of this siding bears an important part in the consideration of the question at issue. It was located wholly upon defendant's right of way, and had been constructed or leased to and was maintained by defendant. It ran parallel with the main tracks, and was about one mile in length, being closed at each end by a bulkhead or bumper. It was connected with the main track by two switches. Along this siding and adjacent thereto were warehouses used by firms or corporations having frequent occasion to ship or receive freight over defendant's road. In front of the warehouse of Chirichello & Sons, and between it and the siding, was a loading platform, which was the property of said firm. *About 140 feet* west of this warehouse was the freight house of defendant.
>
> The car upon which the goods were loaded had been placed by defendant on the siding immediately in front of the shippers' warehouse on the morning of December 14, 1914, and its

> loading by the shippers had been concluded at about half past 3 in the afternoon of the same day. The shippers then made out a bill of lading and took it to the freight house, where defendant's representatives signed it and sent a man to seal the car."

The car was broken into during the night and a portion of the merchandise stolen.

It will be seen, therefore, that the siding involved in this case was somewhat similar to the siding in the instant case, being used by several industries, and the railroad also used same for it own purposes, "for the storage of cars and for making up and unmaking trains." 163 N. Y. Supp., 116. The main question discussed in the opinion of the court is the meaning of the words "private or other siding." The court concluded that while the siding was not a private siding, it was within the meaning of the term "or other sidings," and that as the car had not been attached to a train there was no liability. Said the Court:

> "If we seek for the reason for the condition, we are confirmed in the view that it applies to all sidings, both public and private. The object and purpose of the condition is to define when the carrier's liability for lost property loaded on cars shall begin and shall terminate. The meaning and intent of the stipulation, which is a term of the contract of carriage, is that liability for such property shall begin when the car is removed from the siding and attached to a train, and shall terminate when it is detached from the train and placed on a siding."

As will be seen from the above decision there was a regular appointed agent at Passaic, New Jersey.

This fact did not prevent the court from holding that there was no liability.

The case just discussed afterwards went to the Court of Appeals of New York, Bers v. Erie Railroad Co., 225 N. Y., 543; 122 N. E. Rep (N. Y.), 456. The judgment was affirmed. The Court of Appeals said:

> "It was not a private siding. Private sidings include mainly those which are owned or maintained by shippers for the purpose of connecting their factories and warehouses with the tracks. They thus provide themselves with conveniences which the railroad fails to furnish. It was not a public siding, open to the use of the shipping public in general, for the loading and unloading of cars, *like the freight station and yards. It was not a part of the railroad terminal or freight station.* It was separate therefrom as effectively *as if the warehouse had been five miles from the freight depot. It was an industrial switch, a terminal facility for the use and convenience of the shippers whose warehouses were adjacent thereto.* It was like a private siding in all respects except that the carrier owned it. These shippers were fortunate enough to have the advantage of a private siding without the burden of private ownership. If any force is to be given to the words 'or other,' as qualifying rather than amplifying the word 'private,' they must be extended to include such a siding as this. Thus full meaning is given to the words used and the apparent purpose of the parties is accomplished."

In the case of Standard Combed Thread Company v. Pa. R. R. Co., 88 N. J. Law, 257; 95 Atl. Rep., 1002; L. R. A. 1916 C, 606, the same paragraph of

the bill of lading was construed. In that case the court said:

> "Defendant maintained what is called a 'public siding' near plaintiff's factory, and was accustomed to place cars thereon for the convenience of plaintiff and other shippers in loading. The station of defendant company was *one-half mile away*, and the custom was for plaintiff to telephone for a car when needed, *to defendant's freight agent* at the station, and a car would be placed, and the shipper allowed forty-eight hours to load it."

And the court further said:

> "But assuming a delivery, still, under the terms of defendant's uniform bill of lading, the goods remained at the risk of the shipper. The 'Carmack amendment,' which is part of section 20 of the Interstate Commerce act as amended by the Hepburn act of June 29, 1906 (34 Stat. at L. 584, chap. 3591, Comp. Stat. 1913, sec. 8563, quoted in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148), requires the issue by carriers of a bill of lading. Under the act, and the regulations made by the Interstate Commerce Commission pursuant thereto, defendant was required to submit and publish with its tariffs a uniform bill of lading; and, in the absence of a disclaimer by the shipper and the acceptance of a 10 per cent. higher rate, the terms of the uniform bill of lading are declared applicable. Such a bill of lading was submitted, approved and published. It contained the clause quoted above. In International Watch Co. v. Delaware, L. & W. R. Co., 80 N. J. L. 553, 78 Atl. 49, affirmed in 82 N. J. L. 528, 82 Atl. 730,

on the opinion delivered in the supreme court, it was held (page 556 of 80 N. J. L.) that 'where no bill of lading is given, the shipper himself stands in the same position as if he was the lawful holder of such bill of lading, and the liability of the company to such shipper is the same liability as is imposed in favor of the lawful holder of a receipt or bill of lading.'

"The clause in question, then, was binding on both parties, and it remains to ascertain whether the siding in question was a 'private or other siding.' It was not a private siding. The trial court held the view that a public siding was not in the intendment of the clause, an 'other' siding. We do not share the view. If sidings are to be classified into private and other sidings, the other sidings would necessarily be other than private, and the logical alternative to 'private' is 'public.'

"On the facts stipulated, the defendant was entitled to judgment."

In the case of Bianchi & Son v. Montpelier & W. R. Co. (Vermont), 104 Atl. Rep. 144, the same clause of the bill of lading was construed. In that case it appeared that there was a shipment of a granite monument from Barre, Vermont, to St. Louis, Mo. The car containing the monument was delivered upon the "switch" of one Tieman. As to the switch the Court said:

"The L. H. Tieman mentioned lived at St. Louis, and had had the switch in question built by the Missouri Pacific Railroad for his convenience, it being understood that he should be responsible for the freight charges on all shipments placed on that switch. The switch or sid-

> ing named abutted on Tieman's land, and no one except Tieman and the railroad company could have goods placed thereon without the former's consent."

The question involved was the liability of the railroad as an insurer after the placing of the car on Tieman's switch. Said the Court further:

> "This provision is reasonable in the eye of the law, and not inconsistent with public policy; and the law presumes that the plaintiffs assented thereto and agreed to be bound by it. Davis v. Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; Leavens v. American Express Co., 86 Vt. 342, 85 Atl. 557, Am. Cas. 1915C, 1188.
>
> "When the car containing the monument was delivered on the Tieman switch specified, and was detached from the train, and the consignees were given a reasonable opportunity to inspect the monument and take it away, the responsibility of the carrier, as such, ceased."

On the facts the Court also held the railroad company not liable as a warehouseman.

In the case of Y. & M. V. R. R. Co. v. Chickasaw Cooperage Company, in the Supreme Court of Arkansas (not yet officially reported) the clause of the bill of lading in question was held to grant exemption from liability even at any agency station, when the loaded car had not yet been attached to a train.

This opinion of the Supreme Court of Arkansas will be shortly published and will be referred to more fully at a later time when the opinion is published.

It will be noted that in the decisions in which exemption from liability has been held to apply to loaded cars which have not been attached to trains, the courts of New York, New Jersey, Vermont and Arkansas did not discuss whether the words "at which there is no regularly appointed agent" were a part of the clause relied on, but the facts showed that in each instance there was a regularly appointed agent at the "station" or "freight house."

The gist of these opinions is that even though there is an agent *at a public railroad freight house or station*, the liability of the carrier as to cars loaded on side tracks (not part of the freight house facilities) does not begin until such cars are attached to trains, regardless of whether the side track be absolutely private or absolutely public or quasi-private or quasi-public. In order that the liability of a common carrier may attach before cars loaded on side tracks are attached to trains, it must appear that the side track on which the loading is done is in reality the *house track* of the station or freight house or an *integral part* of the station building and immediate station facilities, over which the agent at the station could reasonably be expected to exercise supervision and care. The loading in this case was done by the shipper on private property at a gin owned by a third party and a thousand feet distant from the station. Under these facts we insist that the exemption granted by the last clause applies with full force.

While the construction of the meaning of the sentence from a grammatical standpoint is not necessarily conclusive, yet it is persuasive, and construing the paragraph of the bill of lading from a grammatical standpoint it seems clear that the words "at which there is no regularly appointed agent" should not be brought forward into the second clause.

But even bringing these words forward into the second clause does not lead to the effect given to the clause by the Supreme Court of Mississippi. *There was no regularly appointed agent of the railroad at the cotton gin.* There was a regularly appointed agent at the freight house whom the law would expect to have custody and control of goods in the freight house and of goods on house tracks or side tracks immediately adjacent to the freight house, that is, such tracks as were a part of the freight house facilities. But the law would not expect an agent to exercise supervision and care over a car on private property loaded at a gin of a third party and a thousand feet away from the freight house. Indeed, the court judicially knows that in large terminals side tracks such as the one in question are frequently many miles away from the freight station.

THE EXEMPTION FROM LIABILITY APPLIES TO ALL CARS LOADED ON ANY KIND OF A SIDING WHICH IS NOT AN INTEGRAL PART OF STATION OR FREIGHT HOUSE FACILITIES.

In Bers v. Erie R. R. Co., 122 N. E. (N. Y.) 456, the Court of Appeals of New York had under consideration a car loaded on a side track *only* 140 *feet* from the freight house of the railroad company. The track was owned entirely by the railroad company and was entirely on property of the railroad company and was used by warehouses abutting on said side track, and also by the railroad company for its own purposes. In that case the Court of Appeals of New York said:

> "It was not a public siding, open to the use of the shipping public in general, for the loading and unloading of cars, *like the freight sta-*

*tion and yards. It was not a part of the rail*road terminal or freight station. It was separated therefrom as effectively as if the warehouse had been five miles from the freight depot. It was an industrial switch, a terminal facility for the use and convenience of the shippers whose warehouses were adjacent thereto. It was like a private siding in all respects except that the carrier owned it. These shippers were fortunate enough to have the advantage of a private siding without the burden of private ownership. If any force is to be given to the words 'or other,' as qualifying rather than amplifying the word 'private,' they must be extended to include such a siding as this. Thus full meaning is given to the words used and the apparent purpose of the parties is accomplished."

The Supreme Court of New York in the same case (163 N. Y. Supp. 116) said of the same track that it was used for the storage of cars and for "making up and unmaking trains;" that is for general railroad purposes.

The decision of the Court of Appeals of New York, we submit, gives the correct construction and effect to this clause of the bill of lading. In other words, it is entirely reasonable that a railroad company's liability as a common carrier should begin immediately on the issue of a bill of lading as to goods delivered at its freight house or on its freight house platform or into cars which are standing on side tracks immediately adjacent to the freight house and which are an integral part of the freight house facilities. But it is not reasonable to expect, when a shipper, instead of delivering his cotton at the freight house, or the freight house platform, or into a car immediately adjacent to the freight house,

elects instead to deliver his cotton on a side track on private property at a cotton gin, that liability should begin until the car is attached to a train. That is, the clause is to be construed in the light of common experience and reason and in the light of the well-known practice of railroads.

It appears from the plaintiff's proof in this case that there was a cotton platform at the station upon which cotton could be delivered for shipment (Original Rec. p. 38). And it appears that the plaintiffs in some instances had hauled cotton to the station platform for shipment (Original Rec. p. 45). This cotton platform of the railroad has a capacity of from fifty to one hundred bales (Original Rec. pp. 38, 68). *The plaintiffs, having elected to load their cotton on private property at a cotton gin where the agent of the carrier could not be expected to give it care and supervision, instead of loading their cotton onto the cotton platform at the station where the agent would be expected to give it care and supervision,* must assume liability for the cotton, and should assume liability for the cotton until the car containing same became attached to a train.

It must not be overlooked that the track was constructed as an industrial track for Mr. Rainer, the owner of the land upon which parts of the track rest. Mr. Rainer, a witness for the plaintiffs, testified:

> "Q. Mr. Rainer, do I understand you to say that before this track was installed, or constructed, you made application to the railroad company for an industrial track, did you?
>
> A. I did.
>
> Q. What was your idea in doing that?

A. I wanted to erect a gin there, and I wanted to put my cotton platform and seed house on the track.

Q. You wanted it there for your convenience, and convenience of your patrons?

A. Yes, sir.

Q. And they did construct the track on your application?

A. Yes, sir.

Q. And the condition on which the track was constructed is embodied in this written contract that you have testified to?

A. Yes." (Original Rec. p. 54.)

Mr. Rainer also said:

"A. Whenever I requested the agent to set a car on that track, the agent or conductor would have it placed where I wanted it, or anybody else getting a car, lots of friends would make a request that they put them out on that track, the agent or conductor to switch them out on there." (Original Record pp. 53-54).

Mr. Rainer also estified:

"Q. Well, when the railroad company undertook to put a track in there, you gave them the right of way?"

A. Well, I didn't give them the land. I gave them permission to put it on my land; but I didn't deed them the land." (Original Record p. 51).

Certainly under these conditions the car of cotton loaded at the gin on the land of a third person could not reasonably be expected to be at the risk of the railroad company until the railroad company took actual possession of same by attaching the car to a train, and the clause in the bill of lading so providing is therefore entirely reasonable and valid and should be given its natural meaning and effect.

THE DECISIONS CONTRA.

The decisions contra are the decision in this case, Y. & M. V. R. R. Co. v. Nichols & Company, 83 Sou. Rep. 5, (Original Record p. 120), and the cases of Jolly v. Atchison, Topeka & Santa Fe R. R. 21, Calif. Appeals, 368, 131 Pac. 1057, and McClure v. Norfolk & Western Railway Company (W. Va.) 98 Southeastern, 514.

We respectfully submit that these opposing authorities just cited are based upon the erroneous proposition that the last clause of the bill of lading in question, which exempts the carrier from liability until cars loaded on private or other sidings are attached to trains, has no application in any city, town or terminal where the railroad maintains an agent, notwithstanding the siding, where the car is loaded, is not a part of the freight house facilities and may be located miles away from the freight house. The construction given by these courts would make common carrier liability attach to a car loaded in the City of Chicago on a private siding ten miles from the freight house, and merely for the reason that there is a regularly appointed agent at the freight house. We submit that this is a complete "non sequitur," and a most strained and unnatural construction, and one that cannot be upheld on the accepted rules of construction of contracts read in

the light of the facts of this case and the known practices of railroad companies in handling carload freight.

There were other questions raised in the case before the Supreme Court of Mississippi, but it is unnecessary to discuss them, as the Supreme Court of Mississippi has based its decision entirely upon the construction and effect of the bill of lading and held upon that basis that the trial judge was correct in directing a verdict for plaintiffs.

We respectfully insist that the case should be reversed and remanded for a new trial.

Respectfully submitted,

CHARLES N. BURCH,
H. D. MINOR,
C. H. McKAY,
Attorneys for Petitioners.

BLEWETT LEE,
Of Counsel.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1919.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY, ET AL., Petitioners,

vs.

NICHOLS & COMPANY, Respondents.

In Re: Petition to the Supreme Court of the United States for writ of certiorari in above case.

To Hon. J. W. Cutrer:

Please take notice that on Monday, January 19, 1920, at noon, or as soon thereafter as counsel may be heard, the foregoing petition and brief will be submitted to the Supreme Court of the United States at its usual place for holding its session at the Capitol at Washington, D. C., for its consideration and action.

CHARLES N. BURCH,
Attorney for Petitioners.

I acknowledge service of a copy of the foregoing petition, brief and notice, this, December 18, 1919.

J. W. CUTRER,
Attorney for Nichols & Company,
Respondents.

SUBJECT INDEX.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 655.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY AND THE UNITED STATES FIDELITY & GUARANTY COMPANY, PETITIONERS,

versus

NICHOLS & COMPANY, RESPONDENTS.

BRIEF FOR THE RESPONDENTS.

The petition for a writ of certiorari which is asked to be directed to the Supreme Court of Mississippi, according to the printed copy submitted to respondents, is not accompanied by a certified copy of the entire transcript of the record in the case, which would appear to be one of the requirements deemed as a condition precedent to a consideration of the petition.

Lau Ow Bew, 141 U. S., 583.

Because of this omission and if the petition is to be considered, it is difficult for the respondents to make a satisfactory reply to it.

It would seem difficult, also, for the Court to gather exact and accurate knowledge of the questions involved without considering the whole case.

The facts as shown by the record are undisputed. The petitioners offered no evidence in contradiction or which challenged the correctness of any statement of fact presented by the respondents upon the trial of the case.

The case originated at law in the Circuit Court of Coahoma County, Mississippi. The respondents are farmers, who availed themselves of the facilities of the petitioning railroad company for the shipment of cotton from a station named Alligator, Mississippi, near which their farming interests were located, to Memphis, Tennessee. The respondents, on November 3rd, 1917, delivered to the railroad company, thirty-one bales of cotton, loaded in one of its cars, consigned to Goodlett & Company, at Memphis, Tennessee, which cotton was of the value, approximately, of seven thousand dollars. The cotton was destroyed by fire before it left Alligator. This cotton was handled by the railroad company in the same way in which it had previously handled something like eight or ten thousand bales of cotton for the respondents, the handling of cotton in this way having extended over a period of several years.

Alligator is a small station on the line of the railroad, but the business which was handled by the railroad at this station was disproportionate to its size and the facilities of the railroad. Among other freight handled at this station were about ten thousand bales of cotton during a cotton season, beginning in October and ending in the spring, which cotton was handled in carload lots, and besides this, there were thousands of other carloads of freight handled in carload lots to and from the same station. This did not include freight handled at the station in less-than-carload lots, which freight was unloaded directly into a small depot there.

The only facilities for handling freight, in the way of railroad trackage, consisted of a short track called a "house

track," which was laid in front of and near the depot and depot platform, and between the depot and the main-line track of the railroad company and what was called by the witnesses a "team track," which deflected from the main-line track something like sixty feet south of the depot, and extended southeasterly from the main-line track a distance of nine hundred or one thousand feet. This track was the only track upon which and by the use of which carload freight incoming and outgoing was handled, and it had been built and in operation something like twenty-one years before the loss of respondent's cotton.

The agreement under which this "team track" was built was unknown to the public, and it appears affirmatively in the record that it was entirely unknown to respondents. The agreement consisted of a writing entered into between the vice-president of the railroad company and one Rainer. After the agreement had been made it had not been placed of record, but one copy of it had been kept in the private files of the railroad company and the other copy had been kept locked up in Rainer's safe.

The agreement in terms provided that Rainer should furnish free of cost to the railroad company all of the ground needed for the construction, use, and maintenance of the side track, and that the railroad company should have "sole and exclusive possession, and the quiet and peaceable enjoyment thereof;" and furthermore, that the railroad company "shall be the owner of and have sole control of the said spur or side track and all material used in its construction, and that the same shall remain personalty and shall not become a part of the realty."

The track was constructed by the railroad company and maintained just like the other trackage owned by the company, and the railroad company had exclusive control over the same.

Mr. Rainer stated: "That it was the only team track in the town. We had a house track at that time, but it was not

arranged so that the teams could unload except at great inconvenience, and this track has been used by the general public there for loading and unloading of all carload lots for quite a good many years."

The record clearly shows that the depot agent for the time being, at Alligator, had sole and exclusive control of the track. This is taken from the testimony of Rainer:

> "Q. What objection had been made at any time to their sole and exclusive use of that property? A. None whatever.
>
> "Q. I will ask you to state whether or not the public has availed themselves of the use of said side track under the instructions of the railroad company? A. They have.
>
> "Q. And has there been any modification or change of these uses at any time? A. No, sir.
>
> "Q. Either before or after the fire? A. No, sir.
>
> "Q. How has the maintenance of that side track been kept up by the railroad company as compared with the other side track? A. Same maintenance by the section crew.
>
> "Q. Who furnished all the material for keeping it up? A. The railroad company.
>
> "Q. How long has the railroad company had an agent at Alligator? A. Ever since I have been there, twenty-one or two years.
>
> "Q. Who has directed the placing and handling of cars on that side track? A. The depot agent down there." * * *
>
> "Q. Who has the power to direct the placing of cars on that track? A. The depot agent.
>
> "Q. Who else has the power to place cars on that track? A. The conductors.
>
> "Q. Who else outside of the employees of the railroad company? A. I do not know that anybody else, except the employees of the railroad company.
>
> "Q. That continued to be so continuously from the time the track was built up until shortly after this fire? A. Yes, sir."

The universal custom in handling carloads of freight on this side track was as follows: When carload freight would come in the depot agent would have it placed on the side track, the consignee would be notified of its arrival, he would pay freight and unload, as is the case in the handling of all "team track" freight, on other tracks at other stations.

In the case of outgoing freight, when a requisition would be made upon the agent for a car, such a car would be placed as the consignor might desire; the consignor would then load, close the car, report destination to the depot agent, and secure a bill of lading. As to cotton, this was found stacked up on the platforms of two gins; the location of the cotton to be shipped would be given to the agent; he would cause a car to be placed for loading, and when loaded the car was closed, the destination and consignee reported to the agent, who would issue a bill of lading for the same, and all of these cars were handled indiscriminately by local freight trains—it being the custom for the first local train passing north or south, as the case might be, to pick up cars bound in the direction the particular train was moving. Frequently it was inconvenient for consignors of cotton to load from the cotton platforms at the gins, owing to the congestion there, but as the cotton platform at the depot was capable of holding, as one witness said, only about fifty bales, and another only about one hundred bales, and as it was practically impossible to load cotton into cars so as to get a carload of cotton into a car placed on what is called the "house track" adjacent to this cotton platform, all carload cotton had to be loaded from the gin platform. This was the course which was followed in the present instance.

Respondents had a carload of cotton to ship; they asked for a car; the agent had the car placed on the side track to receive a carload of cotton; notified the respondents of its location, and respondents loaded it; reported the loading, consignee and destination, and received a bill of lading for the carload of cotton; and then under all the usages of the

place, the consignors were relieved of all further responsibility with respect to the care or handling of the cotton, that being left solely and exclusively to the direction and upon the responsibility of the railroad company.

The cotton was loaded on November 3d, 1917, and was destroyed by fire communicated from one of the gins on November 4th, 1917.

At the time of the fire there were several other cars on this side track, placed there by the railroad company, which made it impossible after the fire began for the carload of cotton to be moved to a place of safety, the way being blocked by these other cars, three or four in number.

The record does not show how many trains passed going north after the car was loaded and bill of lading was issued, but it is clear from the evidence that more than one train did pass north thereafter.

The respondents sought a recovery on this state of facts. To the declaration based thereon the railroad company pleaded the general issue, and as special matter in avoidance set up the fact, "that the said cars on which the said cotton was loaded as aforesaid, were at the time they were so loaded on a private or other siding or side track located near the defendant's depot building at Alligator, Mississippi," and that without negligence on the part of the railroad company, "all of the said cotton was destroyed before it moved from the point of shipment, Alligator, Mississippi, under the said bill of lading above referred to, and before it was moved from the said private or other siding or side track last aforesaid."

The bill of lading referred to as having been issued did not state the rate of freight per hundredweight or otherwise. It is perfectly blank in that respect. It does contain the language quoted in the petition for a writ of certiorari, and that is:

> "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after

unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from the trains."

The bill of lading with the clause stated was introduced in evidence without objection, and the Court gave full force and effect to the bill of lading and all of its provisions, but, considering the facts, which were undisputed, determined that the track in question was a team track under the immediate supervision of the depot agent of the railroad company; the furthest extremity away from the depot was only two hundred and forty yards, and the nearest something between fifty and sixty feet. There was no contention made in the trial court that by any action of the trial court the railroad company was denied the benefit of any title, right, privilege, or immunity which it was entitled to under the Constitution or laws of the United States. No plea of any such title, right, privilege, or immunity was interposed by the railroad company. No such claim of denial was made in the trial court on the motion for a new trial, and the case was closed in the trial court upon the determination of a simple question of fact, as the evidence was made referable to the provisions of the bill of lading or contract of shipment.

In the course of the trial the respondents sought to show that they knew nothing about the contents of the bill of lading; that their attention was not called to the printed matter on the back thereof, but the Court sustained an objection to this testimony, and held that the bill of lading as issued was controlling, and thus gave full force and effect to the contract which the railroad company relied upon in stating its defense.

After the trial and judgment for respondents the railroad company prosecuted an appeal to the Supreme Court of Mississippi, in accordance with the laws of that State, and the case was there heard again.

The assignment of errors filed in that court does not specify that any title, right, privilege, or immunity was denied to the railroad company by the trial court, and no action of the trial court in any such respect was pointed out as the basis for the contention of the existence of any such denial.

The case was argued by the respondents in the Supreme Court of Mississippi upon the proposition that the interstate commerce statute was valid and effective and operated to determine the rights of the parties in the present litigation.

Respondents contended that the side track upon which the cotton was placed at the time it was destroyed was a "team track" and a part of the station facilities of the railroad company at Alligator, and furthermore, that giving full effect to all the stipulations of what is termed the standard bill of lading, the clause relied upon by the railroad company did not apply and could not be determinative of the rights of the parties, because there was a depot agent at Alligator, and because the facts showing delivery upon the "team track" of the railroad company did not warrant the application of any provision of the bill of lading as a bar to the right of respondents to recover.

The Supreme Court of Mississippi decided that the record shows the facts which we have heretofore stated. The evidence not being conflicting in any respect, the Supreme Court of Mississippi expressly found that the track in question, called by the witnesses the "team track," and another, which track extended along the side of the freight-house, known as the "house track," were the only tracks at the time in Alligator for the handling of the railroad company's business, and that between fifty and seventy-five per cent of all carload shipments were handled on this team track, and that the shipping public generally used this "team track" or, as the undisputed testimony of Rainer states it, "this track has been used by the general public for loading and unloading of all carload lots for quite a good many years," and "to this end a track scale was placed on this team track"—which track

scale was used by the public for weighing in and weighing out incoming and outgoing freight as a basis necessarily for the computation and the collection of freight on incoming shipments in carload lots, and the payment of freight on outgoing freight in carload lots.

The Supreme Court also held that the respondents had "no proprietary interest in the gin track and, therefore, had no control over the car after it had been loaded and the bill of lading issued."

These findings of fact must necessarily have resulted in an affirmance of the judgment of the trial court, but further discussing the terms of the bill of lading and giving full effect to it, the Court held that the stipulation relied upon by the railroad company could not be related to a station at which the railroad company maintained an agent, but that the stipulation referred to applied only to stations at which the railroad company maintained no agent. All the inferences of fact drawn from the evidence conducted inevitably to the conclusion that so far as respondents are concerned, they were dealing with the railroad company without knowledge of a secret understanding or agreement between Rainer and it, and acted in good faith in believing the representations of the railroad company, that the track upon which their carload of cotton was standing was a part of the station facilities of the railroad company at Alligator, and that good faith would not permit the railroad company to dispute the effect of this conduct on its part, and thereby defeat respondents' claim to compensation for cotton destroyed without fault on their part, and after they had made a complete delivery of it to the railroad company.

It is upon this state of the record that petitioners pray for a writ of certiorari seeking to reverse the aforementioned finding of facts and conclusions reached thereon by the Supreme Court of Mississippi.

ARGUMENT.

The State Court had Jurisdiction of the Cause of Action and the Parties.

It is well to bear in mind that this is a suit brought by a shipper, to enforce a liability against a carrier which existed at the common law before the enactment of the Carmack amendment, and which the shipper insisted existed after the enactment of the Carmack amendment, by virtue of the terms of the contract of shipment between shipper and carrier, these terms being set out in a bill of lading.

As to the proposition that the State courts have concurrent jurisdiction with the Federal court of suits brought to enforce liability in such cases, we first refer the Court to the case of Galveston, Harrisburg & San Antonio Railroad Co. *vs.* Wallace, 223 U. S., 481.

This was the first case after the enactment of the Carmack amendment, where was brought in question the jurisdiction of a State court to enforce a liability against an initial carrier of an interstate shipment. The carrier insisted that the jurisdiction of such causes of action rested wholly with the various Federal courts, but this Court held otherwise.

> "The real question, therefore, presented by this assignment of error, is whether a State court may enforce a right of action arising under an act of Congress. * * * Where the statute creating the right provides an exclusive remedy, to be enforced in a particular way, or before a special tribunal, the aggrieved party will be left to the remedy given by the statute which created the right. But jurisdiction is not defeated by implication. And, considering the relation between the Federal and the State governments, there is no presumption that Congress intended to prevent State courts from exercising the general jurisdiction already possessed by them, and under which they had

the power to hear and determine causes of action created by Federal statute.

Robb *vs.* Connolly, 111 U. S., 637.

> "On the contrary, the absence of such provision would be construed as recognizing that where the cause of action was not penal, but civil and transitory, it was to be subject to the principles governing that class of cases, and might be asserted in a State court as well as in those of the United States."

This proposition, however, is not denied by petitioners, and we will not continue the argument further, merely citing two other cases where this Court has followed the Wallace case, *supra:*

Penn. Railroad Co. *vs.* Puritan Mining Co., 237 U. S., 121.

Eastern Ry. Co. of New Mexico *vs.* Whittlefield, 237 U. S., 140.

Now if the State court had jurisdiction of the parties and of the subject-matter in this suit, upon what theory may the petitioners invoke the jurisdiction of the Supreme Court of the United States? This can only be done, if at all, by virtue of the provisions of section 237 of the Judicial Code, section 1214 of the United States Compiled Statutes 1916. The material part of this section declares that in cases where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty of, statute of, or commission held or authority exercised under the United States, then the same may be brought up before this Court by a writ of certiorari.

It is petitioner's claim now that they have been denied a title, right, privilege, or immunity granted them by the Carmack amendment, and because of the denial of this right they seek a review of the decision of the Supreme Court of Mississippi. Let us say at the outset that neither the Carmack amendment nor any other act of Congress declares that

carriers in interstate commerce shall have the right to have their rights determined by the Supreme Court of the United States in a case similar to the one at bar, but, on the contrary, the Supreme Court of the United States has decided that the State courts do have jurisdiction of such suits, as heretofore pointed out. So we come back to the original proposition that this Court has jurisdiction only upon the theory that the petitioners have been denied a title, right, privilege or immunity granted them by the said Carmack amendment.

No Federal Question Was Raised in the State Court.

It is elemental that the Federal question, if any be involved in this litigation, must have been raised in the State court in order for this Court to consider the same now. As stated before, there is no statement in the motion for a new trial filed by the petitioning railroad company, in the trial court, nor in the assignment of errors, which could be construed as remotely raising a Federal question. The only pleading upon which petitioners may now rely to raise the question relied upon is in the notice of special matter filed in connection with the railroad company's plea of the general issue. This notice was so filed in accordance with section 744 of the Mississippi Code of 1906, which is as follows:

> "*Notice of Special Matter under General Issue.*— If the defendant desire to prove under the general issue in an action any affirmative matter in avoidance, which by law may be proved under such plea, he shall give notice thereof in writing annexed to or filed with the plea, otherwise such matter shall not be allowed to be proved at the trial; and the defendant may, in all cases, plead the general issue and give written notice therewith of any special matter which he intends to give in evidence in bar of the action, and which he would be otherwise obliged to plead specially; and, when such notice shall be given by the defendant, the plaintiff shall before the trial of the cause, file a writ-

ten notice to the defendant of any special matter which he intends to give in evidence in denial or avoidance of such special matter so given notice of by the defendant, and which it would have been neces-ary to reply specially had the defendant's defense been specially pleaded; and if notice be not given as required, evidence of such matters shall not be admissible upon the trial."

In addition to the fact that the railroad company in its notice, after alleging that the said cotton was not destroyed by their negligence, made this statement:

> "That the said cars on which the said cotton was loaded as aforesaid, were at the time they were so loaded on a private or other siding or side track, located near the defendant's depot building at Alligator, Mississippi."

It is palpable, of course, that the purpose of this statement and the purpose of the proof adduced at the trial, was to prove that the railroad company was relieved of liability in this particular case because of that exemption inserted in the bill of lading which we have quoted heretofore. The trial court and the State Supreme Court have both decided that the facts of this case do not bring it within that stipulation.

Our next inquiry is whether or not the Federal question, if any, was properly raised in the State courts, so as to give this Court jurisdiction. We have already stated the facts.

To give the Court jurisdiction it must appear by the record that a Federal question was raised and decided adversely.

Gaar, S. & Co. *vs.* Shannon, 223 U. S., 468.
Waters Pierce Oil Co. *vs.* Texas, 212 U. S., 86.
C. & O. Ry. Co. *vs.* McDonald, 214 U. S., 191.

That proposition is too well settled by this Court to require the citation of further authority.

> "Appellate jurisdiction over a State court cannot be based on a supposed denial of a Federal right, not urged in a trial court, or called to the attention of or decided by the State appellate court."
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> Cincinnati & N. O. T. P. R. R. Co. *vs.* Slade, 216 U. S., 78.

In the light of this decision, it is to be noted that the railroad company, the only litigant in either State court, did not urge that by a decision contrary to its contention it would be denied a title, right, privilege, or immunity arising to them out of a Federal statute, but on the other hand it simply insisted, first, that the stipulation in the bill of lading was binding upon the shipper, which the Court conceded in making its decision, and it insisted, secondly, that the stipulation upon which it relied, being binding, then the particular facts exempted it from liability. This the Court found against it. This is the denial of the right claimed to constitute the Federal question here.

> "The proper way of raising a Federal question is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that it was presented to the State court."
>
> Mutual Life Ins. Co. *vs.* McGrew, 188 U. S., 291.

This Court has made the distinction for which we now contend in the case of Louisville & Nashville R. R. Co. *vs.* The City of Louisville, 166 U. S., 709.

This was a suit filed by the railroad company against the city of Louisville to recover certain taxes which had been collected by authority of an act entitled "An act to revise and amend the laws of the city of Louisville." It was tried upon an agreed statement of facts, and after the chancery court had decided the case against the company, and that decision

ıd been affirmed by the Court of Appeals of Kentucky, the ɔmpany attempted to raise the question of the validity of ıe State statute, but the Court held that it was too late.

Another case where this Court pointed out the fact that ısisting that a certain contract was to be governed by the ecisions of the United States Supreme Court, and in which ıey held that such an insistence does not raise a Federal uestion, is the case of El Paso & S. W. R. R. Co. *vs.* Eichel Weikel, 226 U. S., 589. The Court in that case used this anguage:

> "But assuming (without, however, conceding) that the plaintiff in error was entitled to a right, privilege or immunity in the premises, derived from the Federal Constitution or laws, the question remains whether such right, privilege or immunity was specially set up or claimed. An examination of the record discloses that while it was repeatedly insisted that the rights of the parties under the contract should be determined according to the laws of the Territory of New Mexico, that such law was to be ascertained from the reported decisions of this Court, and that under those decisions the clauses that gave finality to the decision of the company's engineer were valid and binding, and that the plaintiff's action was foreclosed thereby, it was not suggested that in so insisting the plaintiff in error was asserting or relying upon any right, privilege or immunity or laws of the United States. * * *
>
> "The points raised by plaintiff in error that are now relied upon as an assertion of Federal rights were brought to the attention of the trial court and of the Court of Civil Appeals like any other of a multitude of questions that were raised in those courts; and so far as appeared the decision in both courts proceeded not in disregard of any Federal right asserted or suggested, nor even in disregard of the decisions of this Court, or the authority of those decisions, as laying down the law of the Territory of New Mexico, but rather upon the proper interpretation of the contract, the clause that was cited as giving finality to

> the decision of the company's engineer, was not applicable to the questions in controversy.
>
> "We, therefore, deem it clear that the plaintiff in error did not lay the foundation for a review under section 709, Revised Statutes, either in the trial court or in the Court of Civil Appeals."

Respondents in this case insist that the fact that the railroad company sought to set up facts in its special matter under the general issue which would relieve it from liability under the terms of its contract with the respondents, and the mere fact that the Court decided that these facts did not relieve it from liability under the contract, was not raising a Federal question as contemplated by the former decisions of this Court.

We recognize the authority of the case of St. Louis, Iron Mountain & Southern Ry. Co. *vs.* Starbird, 243 U. S., 592. In this case, which was a case arising out of the Carmack amendment, the Court discussed somewhat at length the question of when a Federal question is properly raised in a State court. The substance of this decision is best expressed in the language of the Court, as follows:

> "The Federal right is not required to be pleaded in any special or particular form. It is enough that it be relied upon and in a proper manner called to the attention of the Court. Section 237 of the Judicial Code does not require that the statute creating the right shall be especially set up. The courts take judicial notice of the statute. It is the right, privilege or immunity of Federal origin which must be brought to the attention of the State courts."

We contend that petitioners do not come within the rule as above laid down. Nowhere in the record of this case can it be found where either of the petitioners brought to the attention of the State courts the claim that a decision of the cause contrary to their ideas would deprive either of them of a Federal right, and thereby give them the right to any appeal to this Court.

The decision of the State court is neither in favor of or against any title, right, privilege, or immunity especially set up or claimed by petitioners under the Federal Constitution or any treaty, statute, commission or authority of the United States.

The Carmack amendment required of carriers in interstate commerce to issue a through bill of lading, but the act did not in any way provide for the terms or conditions that must be contained in that bill of lading, except to provide that if the bill of lading did exempt the carrier from loss or damage caused by it, such a stipulation should be void, and to provide further that the carrier should be liable to the holder of the bill of lading for the loss or damage caused by it, notwithstanding an exemption in the bill itself. In pursuance of the mandate of the act, a bill of lading was issued in the instant case. Counsel for petitioners seem to assume that because the bill of lading used in this particular instance happened to be what is commonly known as the Uniform Bill of Lading. This uniform bill of lading is the one which was recommended for adoption in the report of the Interstate Commerce Commission relating to the subject of bills of lading, which report is dated June 27th, 1908, and is to be found in volume 14, Interstate Commerce Commission Reports, at page 346. It will be noted that the Commission did not undertake to prescribe this as a uniform bill of lading, to be used in every case involving an interstate shipment. The form was merely recommended for adoption by the carriers after a conference with the representatives of certain carriers and the shippers of this country. In its report upon the matter, Chairman Knapp said: "Nor do we undertake to prescribe this bill of lading and order its adoption, because we are convinced that such an order would exceed our authority."

In the case of Cleveland, C., C. & St. L. R. R. Co. *vs.* Dettlebach, 239 U. S., 588, the Court pointed out the fact that the uniform bill of lading has no binding effect in law, that is, has not the weight of a statute of the United States. It said:

> "The recommendation of the Interstate Commerce Commission for the adoption of a uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight."

We have gone into the question of uniform bills of lading because, as stated, counsel for petitioners seem to have the idea that merely because the uniform bill of lading was used in this instance, the Federal Supreme Court has jurisdiction to construe its terms. We, of course, deny any such contention. We contend that the Federal Supreme Court has no more jurisdiction to construe the terms of a uniform bill of lading as such than it would, as of course, have the right to construe the terms of any other bill of lading. In other words, the uniform bill of lading has no more effect to give this Court jurisdiction than if a special contract to govern the terms of some other particular shipment were the subject-matter of this controversy.

A State court having full jurisdiction has construed a certain clause in that bill of lading, which was issued in this instance, and the Court held that the carrier was liable because his contract, written by him, provided that he would be liable in such a case. It may be said that it was the intent of Congress, in enacting the Carmack amendment, to take over the whole domain of interstate commerce, but we submit that the most that can be said of the statute is, that it intended that a carrier should not by any contract exempt itself from the liability for damage caused by it, and, inferentially, that no State statute or court should deny to the carrier the right to limit its liability to the loss or damage caused by it. The cases that have been before the Court so

far are cases in which State courts have held that a carrier was responsible for loss or damage other than that caused by it, beyond the terms of an express stipulation in the bill of lading, or in which the limit of liability had been fixed by the shipping contract; and had the Supreme Court of Mississippi decided that the carrier was liable for loss or damage not caused by it, notwithstanding an express stipulation in the bill of lading limiting its liability, then we would have to confess that the railroad company had been denied a right guaranteed to it by the Carmack amendment, to wit, the right to limit by contract its liability for the damage caused by it. But such is not the case presented here. It must be borne in mind that unless petitioners have been denied a title, right, privilege, or immunity, guaranteed to them by the Carmack amendment, then this Court will have no jurisdiction.

There is another thing to be considered about the Carmack amendment, and that is, that it does not fix the extent of a carrier's liability in cases involving interstate commerce, but rather fixes a minimum below which the carrier may not exempt itself, and as decided by this Court, it guarantees to the carrier the right to limit its liability by the minimum established by the act. The Carmack amendment does not provide that a carrier cannot and shall not assume any greater liability for loss or damage than that caused by it.

In this instance the carrier issued a bill of lading which contained, among other stipulations, the one the construction of which is the subject-matter of this controversy. Both the trial court and the Supreme Court of Mississippi, in construing the peculiar wording of that particular stipulation, and applying the facts of this case to its meaning, held that the intent of the parties to the contract of carriage was that the carrier should be liable. Is that a denial to the carrier of a title, right, privilege, or immunity arising under the Carmack amendment? We respectfully submit that it is not.

The effect of the decision of the State courts is not that a carrier could not exempt itself from liability under the facts of this case, but it is simply that it has not done so; that is to say, the Supreme Court of Mississippi has not denied to the carrier the right to make a contract which would have limited its liability so as to give it an exemption on the facts presented at the trial, but it has simply held that the contract actually made between the carrier and the shipper provided for liability in this case. It is also manifest that the decision of the Mississippi court does not involve the question of the validity of a stipulation contained in the bill of lading, but involves the construction of one of its stipulations. The State court has not denied the binding force and effect of any term contained in the bill of lading. It has merely construed a stipulation to mean that the petitioners are liable by reason of the very terms of its contract.

We have heretofore discussed the history of the adoption of the uniform bill of lading and its legal effect as related to the jurisdiction of this Court and of the State courts. It is pointed out in petitioners' brief that several State courts have construed the particular stipulation in this uniform bill of lading, and that there exists a diversity of opinion as to what it means. We do not think it is worthy of argument that this fact will suffice to give this Court jurisdiction. As stated, the uniform bill of lading stands in the same position as if it had never been issued by the carriers, and in legal contemplation it is no more than a coincidence that the same contract has come up for construction in the courts of different States.

Recurring, however, to the main point under discussion, that is, whether or not, in truth and in fact, the petitioners have been denied a Federal right, we call the Court's attention to those cases which have been decided by it since the passage of the Carmack amendment, and the opinions of which cases throw light upon the problem.

Adams Express Co. *vs.* Croninger, 226 U. S., 491.

Chicago, B. & Q. Ry. Co. *vs.* Miller, 226 U. S., 512.

Missouri, Kan. & T. Ry. Co. *vs.* Harriman Bros., 227 U. S., 657.
N. O. & N. E. R. R. Co. *vs.* Nat'l Rice Milling Co., 234 U. S., 80.
Boston & Me. R. R. Co. *vs.* Hooker, 233 U. S., 97.
George N. Pierce Co. *vs.* Wells Fargo Co., 236 U. S., 278.
Charleston & W. Car. Ry. Co. *vs.* Varn Ville Fur. Co., 237 U. S., 597.
C., C. & St. L. Ry. Co. *vs.* Dettleback, 239 U. S., 587.
Sou. Ry. Co. *vs.* Prescott, 240 U. S., 632.
N. Y., Phila. & Norfolk Ry. Co. *vs.* Peninsular Produce Exc., 240 U. S., 34.
Atchison, Topeka & S. F. Ry. Co. *vs.* Harold, 241 U. S., 371.
Ga., Fla. & Ala. Co. *vs.* Blish Milling Co., 241 U. S., 190.
Cin., N. O. & T. P. Ry. Co. *vs.* Rankin, 241 U. S., 319.
St. L., I. M. & Sou. Ry. Co. *vs.* Starbird, 243 U. S., 592.
American Exp. Co. *vs.* U. S. Horseshoe Co., 244 U. S., 58.

The Croninger case, *supra*, was the first case after enactment of the Carmack amendment where the question of the validity of a stipulation in a bill of lading limiting the amount which might be recovered in case of loss of goods was decided. The Court held in that case, that such a stipulation was valid and binding, reversing the decision of the State court.

The cases subsequent to the Croninger case, so far as we have been able to determine, have all involved the question of the validity of a stipulation, and in no case has the jurisdiction of this Court been maintained solely to determine the proper construction of a stipulation. We contend that

those cases which have held that various stipulations were binding do not overrule the contention which we make here. There is a very great difference between the validity of a stipulation and its construction. To deny the validity of a stipulation, we submit, would give to the Federal Supreme Court jurisdiction to determine whether or not the same was valid, and that question would be determined in accordance with a uniform rule as contemplated by the Carmack amendment, but to hold that when a State court has construed a stipulation, and that construction does not agree with the views of the losing side, would create jurisdiction, would be going very much further than this Court has yet gone. Otherwise, it would be an idle thing for this Court to declare that a State court has jurisdiction of such a suit. It would be tantamount to holding that in every such case if a party were not satisfied with the decision of the State court, then he could seek redress, in the highest court of the land. Such, we submit, was not the intent of Congress, nor is it the intent of those cases to which we have respectfully called the Court's attention.

Justice Lurton, in his opinion in the case of Missouri, Kansas & Texas Ry. Co. *vs.* Harriman Brothers, *supra*, succinctly stated the rule by which it might be determined whether or not this Court would take jurisdiction of a suit where it was sought to enforce liability against a carrier in interstate commerce. He lays down the rule in this language:

> "The liability sought to be enforced is a liability of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment to the Hepburn act of June 29th, 1906. The validity of any stipulation is such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be determined under the general common law, and as such is withdrawn from the field of State law or legislation. Adams Express Co. *vs.* Croninger, *supra*."

The case at bar involves neither the validity of any stipulation in the bill of lading nor the validity of a limitation upon the liability. Therefore, we submit this case cannot be brought within the true rule.

For the reason stated, we respectfully submit that the petition for the writ of certiorari to the Supreme Court of Mississippi, as prayed for by the petitioners, should be denied.

Respectfully submitted,

JOHN W. CUTRER,
Attorney for Respondents.

We acknowledge service of a copy of the foregoing brief, this the 10th day of December, 1919.

CHARLES N. BURCH,
H. D. MINOR,
C. H. McKAY,
Attorneys for Petitioners.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

No. 216.

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY AND THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

vs.

NICHOLS & COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PETITIONERS.

CHARLES N. BURCH,
H. D. MINOR,
CLINTON H. McKAY,
Attorneys for Petitioners.

W. S. HORTON,
Of Counsel.

TOOF-MEMPHIS

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TABLE OF CASES

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STATEMENT OF THE CASE, SPECIFICATION OF ERRORS, BRIEF AND ARGUMENT ON BEHALF OF PETITIONERS.

May It Please The Court:

This case is before this Honorable Court on writ of certiorari (heretofore granted) to the Supreme Court of the State of Mississippi to review a judgment of that Court, which affirmed a judgment

originally rendered in the Circuit Court of Coahoma County, Mississippi, in favor of respondents (plaintiffs in the trial court) and against petitioner, The Yazoo & Mississippi Valley R. R. Co., (defendant in the trial court) in the sum of $7,510.12 and costs.

The opinion of the Supreme Court of Mississippi is reported in 120 Miss., 690, 83 Sou. Rep., 5.

STATEMENT OF THE CASE.

The suit was brought in the Circuit Court of Coahoma County, Mississippi, on July 26, 1918, to recover the value of 31 bales of cotton, which had been loaded by plaintiffs for shipment over The Yazoo & Mississippi Valley Railroad, from Alligator, Mississippi, to Memphis, Tennessee.

The cotton was destroyed by fire, without negligence on the part of the Railroad Company, on November 4, 1917, after a bill of lading had been issued by the Railroad Company and after the cotton had been loaded by plaintiffs into a box car on a side track serving a cotton gin, but before the car containing said cotton had been removed from said side track (Rec. p. 1).

Plaintiffs' declaration merely alleged the breach of defendant's duty as a common carrier to deliver said cotton to the consignee at Memphis, Tennessee.

Defendant relied in its defense upon the last paragraph of Section 5 of its bill of lading, reading as follows:

> "*Property* destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent, shall be entirely at risk of owner after unloaded from cars or

vessels or until loaded into cars or vessels, *and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.*"

(Record, p. 18).

The portion of the bill of lading relied upon by the Railroad Company for exemption from liability is that shown in italics in the above excerpt.

The bill of lading in this case is what is known as the uniform bill of lading, which has the approval of the Interstate Commerce Commission, the same having been recommended by the Interstate Commerce Commission for adoption in the case entitled "In the matter of Bills of Lading," 14 I. C. C., page 346.

This is also the bill of lading referred to in the tariff and classification of the Railroad Company filed with the Interstate Commerce Commission (Rec. p. 65, et seq.)

Plaintiffs shipped their cotton under this uniform bill of lading at a reduced rate, *but* plaintiffs, under the tariff (Rec. p. 66), could have shipped their cotton at a higher rate, and under a bill of lading "limited only as provided by common law

and by the laws of the United States and of several States in so far as they may apply."

The town of Alligator, Mississippi, is a small station on the line of the Yazoo & Mississippi Valley Railroad, at which an agent is maintained, and there is a spur track leading from the main line of the railroad at said station and extending for a distance of about one thousand feet to a cotton gin (Rec. p. 40). This side track was constructed under a contract with one Rainer (Rec. p. 36), and served two cotton gins, and was also at times used for the loading and unloading of general carload freight. The material in this side track belonged to the Railroad Company, but the land upon which the portion of the spur track, where the car was burned, rested, was the private property of another person (Rec. p. 35).

The cotton involved in this case was ginned and prepared for shipment at the cotton gin at the end of said side track and was loaded *by plaintiffs* in a box car from the platform of the cotton gin (Rec. p. 21).

The car was placed at the cotton gin on Saturday, November 3, 1917, and the loading of the car was completed about one o'clock (P.M.) of that day, and the bill of lading was issued therefor by the agent at Alligator about 1:30 P. M., of the same day (Rec. p. 21).

The cotton was destroyed by fire on the following day (Sunday), November 4, 1917, at about four o'clock P. M., by the spreading of a fire originating in the gin, and *before the car had been attached to any engine or train* or in any way moved from said side track, or from the place where it was loaded (Rec. pp. 20-22).

On the trial of said cause in the Circuit Court of Coahoma County defendants relied for exemption from liability on the paragraph in the bill of lading above referred to, in as much as the car containing the cotton *had not been attached to any train.* Plaintiffs denied the validity of said clause in the bill of lading. However, the Supreme Court of Mississippi, in deciding the case, held, in substance, that the clause in the bill of lading above referred to was valid, but the Supreme Court of Mississippi construed said clause *not to be applicable to the instant case*, as the proof showed that the Railroad Company had a regularly appointed agent at Alligator. In other words, the Supreme Court of Mississippi held that there should be read into and interpolated into the last clause (above referred to) the words "at which there is no regularly appointed agent," and that said words "at which there is no regularly appointed agent," which appear in the first clause of the above excerpt from the bill of lading were also a part of and to be read into the second clause of said paragraph of the

bill of lading. The Supreme Court of Mississippi based its opinion (Rec. p. 76), entirely on the said construction of said clause of the bill of lading. This paragraph of the uniform bill of lading has been passed upon by the highest courts of several states and there is a diversity of opinion among the state courts as to the proper meaning and effect of this paragraph of the uniform bill of lading. The Supreme Courts of Mississippi, California and West Virginia hold that the clause above referred to grants exemption from liability *only at non-agency stations;* whereas, the Supreme Court of New York and also the Court of Appeals of New York and the highest courts of New Jersey, Vermont and Arkansas allow exemption from liability (as to loaded cars not yet attached to trains) without regard to whether *the station* is an agency or a non-agency station, as will be shown hereafter.

The question as to whether at agency stations, the last clause of the above paragraph of the uniform bill of lading gives to carriers exemption from liability as to loaded cars for which a bill of lading has been issued, but which have not been attached to trains, is a matter of great importance to shippers and carriers, and the proper construction of said paragraph of the bill of lading can only be authoritatively determined by this Court. Only by a decision of this Court can a uniform construction of said bill of lading be attained, and only

thereby can shippers and carriers be definitely advised as to their rights and liabilities.

SPECIFICATION OF ERRORS.

Your petitioners now aver that the following plain errors were committed by the Supreme Court of Mississippi in rendering the judgment complained of against petitioners:

1. The Supreme Court of Mississippi erred in holding that the clause in the bill of lading aforesaid applied only at stations at which defendant had no regularly appointed agent.

2. The Supreme Court of Mississippi erred in this, that the clause in said bill of lading relied upon by defendant was construed by the Supreme Court of Mississippi not to apply except at stations at which defendant had no regularly appointed agent, contrary to its manifest words and intent.

3. The Supreme Court of Mississippi erred in holding that, under the Act to Regulate Commerce as Amended, the tariffs and bill of lading aforesaid, and the common law rules accepted and applied by the courts of the United States, the defendant was liable for the destruction of said cot-

ton by fire while it remained on the private siding at the gin at which it was loaded, when said fire originated in the gin, without negligence of defendant, and without negligence of defendant in exposing the cotton to the fire, and without negligence of defendant in its attempt to rescue the cotton from the fire, after the fire was discovered.

4. The Supreme Court of Mississippi erred in holding that the trial judge did not err in directing a verdict for plaintiff.

5. The Supreme Court of Mississippi erred in holding that the trial judge did not err in refusing to give defendant's request for an instruction that plaintiffs were entitled to recover the freight charges of $91.44, (which had been subsequently paid), and interest thereon and "no more" (Rec. p. 68).

BRIEF.

The stipulation of the Bill of Lading in question, so far as pertinent here, applies at all stations, whether agency or non-agency stations.

Bers vs. Erie R. R. Co., 163 N. Y. Supp. 114;

Bers vs. Erie R. R. Co., 225 N. Y. 543, 122 N. E. 456;

Siebert vs. Erie R. R. Co., 163 N. Y. Supp. 111;

Standard Combed Thread Co. vs. Penn. R. R. Co., 88 N. J. Law 257, 95 Atl. 1002, L. R. A. 1916 C. 606;

Bianchi & Son vs. Montpelier, Etc. R. R. Co., 92 Vt. 319, 104 Atl. 144;

Y. & M. V. R. R. Co. vs. Chickasaw Coop. Co., 141 Ark. 71, 215 S. W. 897.

Contra:

Jolly vs. Atchison, Etc. R. R. Co., 21 Calif. App. 368, 131 Pac. 1057;

McClure vs. Norfolk & Western Ry. Co., 83 W. Va. 473, 98 S. E. 514;

Y. & M. V. R. R. Co. vs. Nichols & Co., 120 Miss. 690, 83 Sou. Rep. 5;

2. The words "private or other sidings," as used in said stipulation, include an industry track built beyond the way lands of the railroad company, upon the application of and under contract with the owner of a public gin, primarily to serve

the gin and its patrons, though the track may be used for other railroad purposes, for the convenience of the railroad company or other shippers.

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ARGUMENT.

As will be seen from the foregoing statement, this case involves the construction, meaning and effect of the following paragraph in the uniform bill of lading:

> "*Property* destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, *and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains.*"
>
> (Record, p. 19).

We shall attempt to show that the Supreme Court of Mississippi has placed a totally unnatural and erroneous construction on this paragraph. The Supreme Court of Mississippi, in its opinion, found that the cotton was destroyed by fire without negligence on the part of the railroad company, and bases its conclusion of liability of the defendant railroad company entirely on the construction which it has given to the last clause of the above paragraph. It is our purpose to show that the paragraph does not mean and cannot mean what the Mississippi Supreme Court has declared that it does mean.

It is true that the word "property" in the quoted paragraph of the bill of lading is the subject of the verb "shall be" in both the first and second clauses; but the first and second clauses refer to totally dissimilar and distinct conditions. It is our contention that the keynote to the proper construction of this paragraph is to be found in the word "private" (as used in the second clause). In other words, it is our contention that the word "private," as used in the second clause and as applicable to the words "wharves or landings," is thereby intended to differentiate the wharves or landings referred to in the first clause. That is, it is our contention that the first clause refers to a *public* station, wharf or landing; and that the second clause refers to private wharves or landings and private sidings, and also to all other sidings, whether the same be quasi-private or public, or quasi-public, *but not including* those public side tracks which are *immediately adjacent to* and serve a public *station*, and from which freight is unloaded into a public depot or loaded from a public depot into cars on such public sidings. In other words, the words "private or other sidings" do not include *side tracks, team tracks,* or *house tracks* immediately adjacent to a freight house, that is, those tracks which *are an integral part* of the public freight house facilities. The last mentioned sidings are included in the term "station" in the first

clause, as such tracks are as much a part of the station as the station platform. To make the matter clearer, it appears from this record that there is what is called a house track which is immediately parallel with and adjacent to the freight depot and platforms (Rec. p. 12) (Blueprint, p. 37). Of course, a railroad could not properly provide that it would not be responsible for goods loaded into a car (when such car was standing on a public side track immediately adjacent to the freight house) until such car had been attached to a train.

Furthermore, at a station *where an agent is maintained*, the railroad becomes responsible as soon as goods are deposited on the freight house floor or platform, and bill of lading is issued, or if not deposited on the freight house floor, just as soon as the goods are placed in a car which is on a track *which serves the freight house*, and bill of lading is issued.

We insist, therefore, that the whole paragraph, according to its true intent and meaning, should be construed as if it read as follows:

"Property destined to or taken from a *public* station, wharf, or landing, at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels, or until loaded into cars or vessels, and when received from or delivered on private or other sidings (*said other*

sidings not including those sidings which are an integral part of public freight house facilities) *private wharves,* or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

The words in italics are inserted by the writer of this brief. The rest of the language is just the same as it appears in the bill of lading.

Looking now to the first clause of this paragraph it means that if a carrier has a public station, wharf or landing, at which the carrier does not maintain a regularly appointed agent, then in such event, the carrier shall be responsible until inbound goods are unloaded from the cars, and as soon as outbound goods are loaded into cars.

The second clause means that when a party receives or delivers goods not at a regular freight house, or not at a track serving the regular freight house, but on a private or other siding, then in such event the liability of the carrier as a common carrier shall not begin until (as to outbound freight), the loaded cars are attached to trains, and as to inbound freight the common carrier's liability shall cease when cars are detached from trains.

We are concerned here with outbound freight and will give some further attention to that feature

Looking then to the feature of outbound freight, we insist that where the shipper loads his own freight, as is the case here, and loads it at a *public* station, wharf, or landing, at which there is no regularly appointed agent, the liability of the common carrier under the first clause attaches as soon as the goods are loaded into a car; and we further insist that when a shipper *does not choose* to load his freight at a regular public freight house, but, on the other hand, *chooses to load his freight at a private wharf* or private landing or on any kind of a side track (which does not serve a public freight house), then in such event the liability of the common carrier does not attach until the car containing such goods is attached to a train.

It is well known that a railroad agent works in the freight house or station building, and it is entirely reasonable to expect him to supervise and take care of all property in the station building and all property on tracks immediately adjacent to the station building, which are an integral part of station building facilities. But it is not reasonable to expect the station agent to have supervision of and to take care of property in cars on side tracks which are not immediately at a station building, but which are some distance therefrom, and particularly when the side track is located on land not belonging to the railroad company. For instance, in every large city there is an agent at the

freight house for the receipt of outbound freight, and this agent, either personally or through his assistants, is in a position to see and to take care of the freight delivered in his freight house for outbound shipment, or loaded into cars which are on tracks immediately adjacent to the freight house, but such agent could not be expected to see and take care of cars loaded on all the private sidings of all the warehouses and industries of such city, or even on public sidings which are not immediately at and adjacent to his freight house. Of course, the Court judicially knows that a large part of the tonnage of the country is loaded into cars which are on tracks quite remote from the place of business of the local station or depot agent. As to such cars the railroad company has a right to insist that its liability as a common carrier shall not begin until such cars are attached to trains. *No one is required to load his freight on a private side track or a public side track remote from the regular depot.* A shipper has the right if he chooses to deliver his freight at *the regular freight depot* or to load it into cars placed immediately adjacent to the regular freight depot. If the shipper, *for his own convenience*, elects to load his cars at some other point, then, certainly the carrier has a right to say that, in such event, the carrier's liability as a common carrier or insurer, shall not begin until the cars are attached to a train—in other words, until

the cars are in the actual, as distinguished from the constructive possession of the carrier.

This brings us to a discussion as to the true character of the track upon which the cotton in this case was standing when destroyed by fire.

CHARACTER OF THE SIDE TRACK.

The record shows that there is a station or depot at Alligator, at which the agent of the carrier transacts business. The record further shows that there is a public side track, known as the house track, immediately adjacent to the station or depot. The car of cotton involved in this case was not loaded on this house track. If it had been loaded on this house track we would not deny liability.

The track involved here begins at a point about sixty feet south of the depot platform and extends in a southeasterly direction on a curve for a distance of one thousand feet to the gin, at which the cotton involved in this case was loaded. This track was built by the railroad company under a contract between the railroad company and one J. C. Rainer (Record p. 36). The contract provides that whereas J. C. Rainer was engaged in business at Alligator and "in order to facilitate the carrying on of *his* business, desires to have a spur or side track constructed, connecting with one of the tracks of

the party of the first part (the railroad company)," it is therefore agreed that Rainer shall furnish to the railroad company the ground needed for the construction of the side track, so far as the same should extend beyond the right of way and grounds of the railroad.

It was further agreed that the railroad company should construct the track and furnish all the track material. It was also agreed that the railroad company should be the owner of all the track material and that the track material should remain personalty and should not become a part of the realty, and that the railroad company should have sole control of the side track and that the railroad company should have the right to take it up at any time in its discretion on thirty days' notice to Rainer, and it was further agreed that the agreement was to be binding on both Rainer and the railroad company and their successors.

From this contract and from the record it is clear that the railroad company did not own the land (beyond its right of way) on which the track was built. It merely used only so much of the land as was necessary for the construction of the track beyond the right of way line. Rainer and his successors in title owned and still own the land on which the track is laid immediately adjacent to the cotton gin.

It will be seen from this contract that the track was built at the instance of Rainer "to facilitate the carrying on of *his* business"—his business being the operating of a gin for hire. Rainer, before the bringing of this suit, had sold his gin to one Parks and had built another gin on this same side track, somewhat nearer to the station. It is true that this track while serving these gins was also used to a considerable extent by the railroad company for the loading and unloading of a large portion of the carload freight handled at Alligator.

In the opinion of the Supreme Court of Mississippi, it is said:

> "There is evidence tending to prove that the Parks gin track and the railway company's house track along the depot furnished the facilities for handling incoming and outgoing freight, and that between 50 and 75 per cent. of all carload shipments were handled on the side track leading by Parks' gin; that the shipping public used the gin track, and to this end a track scale was placed on this gin track."

This statement of the Supreme Court of Mississippi is to be read in the light of the uncontradicted fact that the *track scale* was not installed by the railroad company, but was installed by Rainer, Parks and Kline. The record on this is as follows:

"Mr. Cutrer: One original question: Mr.

Rainer, in reference to this side track, I omitted to ask you whether or not the railroad company had put in a track scale on that track?

A. The railroad company has not put in a track scale. Mr. Parks and Mr. Kline and myself have put in the track scale, and it is used by the town in the way of carload stuff that come in there. We weigh out all our seed, and weigh in carloads of hay and grain.

Q. Is that, or not, the only track scale used by the railroad company at Alligator?

A. Yes, sir.

Q. I will ask you to state to the jury whether or not the railroad company has continuously, since that scale was put in there, used it in the settlement of freight coming in and going out?

A. I don't—I could not say. My bookkeeper has been doing that.

Q. I will ask you to state whether or not it has been used in connection with the business of the railroad company at that point?

A. They make a switching charge, and weighing the cars.

Mr. McKay: And that scale belongs to Mr. Parks and you and Mr. Kline?

A. That was put in at our expense. The railroad did the work; but we paid the railroad for it." (Rec. pp. 37-38).

The car in which the cotton was loaded in this case was placed by the railroad company on the

track opposite the gin at the request of the shipper (Rec. pp. 20-21). The shipper did not request the car to be placed on the house track immediately in front of the freight station. This was evidently for the shipper's convenience, as it was apparently easier for the shipper to load the cotton at the gin than to haul it from the gin to the freight station platform, or load it into a car on the house track. The loading of the car was done by the shipper (Record p. 13).

The agent of the railroad company issued a bill of lading upon the statement of the shipper that the car had been loaded (Rec. p. 14).

The plaintiffs, having elected to do their own loading at the cotton gin, and not haul the cotton to the freight house, thereby became bound by the stipulation in the bill of lading, which provides, in substance, that the liability of the railroad company did not begin until the car containing the cotton should be attached to a train. This was entirely reasonable, as it could not be expected that the company would assume liability as an insurer for a car of cotton only constructively in its possession, when it was not located immediately adjacent to the freight house, where the agent could watch and check the loading of the cotton and take care of it, but which was located over one thousand feet away on private property at the end of a side track adjacent to the cotton gin.

THE JUDICIAL DECISIONS CONSTRUING THE CLAUSE OF THE BILL OF LADING IN QUESTION ARE CONFLICTING.

In the case of Siebert v. Erie R. R., 163 N. Y. Supp., 111, a car was robbed. Said the court:

> "The loss in the present case occurred while the silver was in the car upon a siding adjacent to the works of Ledoux & Co., and before the said car had been attached to a train."

The report of the case shows that the agent of the railroad company "went into the car, counted the bags and sealed the car." In other words, while the court does not stress the fact, yet it does appear from the report of the case that the car was loaded on a side track and that the railroad company had an agent at the station (Bergen Junction) and that the agent went into the car, counted the bags of silver and sealed the car.

The identical paragraph in the bill of lading was relied on by defendant, as in the instant case. The New York Court, without going into any elaborate discussion of the matter, held that as the car had not been attached to a train the defendant had a complete defense to the action.

In the above case it does not appear what the distance was from the station (Bergen Junction)

to the works of Ledoux & Co., where the car was loaded. But the whole inference from the opinion is that the car was loaded on a side track used by Ledoux & Co., and not on a side track which was an integral part of the freight house or depot facilities.

In the case of Bers v. Erie Railroad Company, 163 N. Y. Supp., 114, the same paragraph of the uniform bill of lading was under construction. The merchandise was loaded at Passaic, New Jersey, "upon a siding in front of the shipper's warehouse." As to the character of the side track the New York Supreme Court said:

> "The character of this siding bears an important part in the consideration of the question at issue. It was located wholly upon defendant's right of way, and had been constructed or leased to and was maintained by defendant. It ran parallel with the main tracks, and was about one mile in length, being closed at each end by a bulkhead or bumper. It was connected with the main track by two switches. Along this siding and adjacent thereto were warehouses used by firms or corporations having frequent occasion to ship or receive freight over defendant's road. In front of the warehouse of Chirichello & Sons, and between it and the siding, was a loading platform, which was the property of said firm. *About* 140 *feet* west

of this warehouse was the freight house of defendant.

The car upon which the goods were loaded had been placed by defendant on the siding immediately in front of the shippers' warehouse on the morning of December 14, 1914, and its loading by the shippers had been concluded at about half past three in the afternoon of the same day. The shippers then made out a bill of lading and took it to the freight house, where defendant's representatives signed it and sent a man to seal the car."

The car was broken into during the night and a portion of the merchandise stolen.

It will be seen, therefore, that the siding involved in this case was somewhat similar to the siding in the instant case, being used by several industries, and the railroad also used same for its own purposes, "for the storage of cars and for making up and unmaking trains." 163 N. Y. Supp., 116. The main question discussed in the opinion of the court is the meaning of the words "private or other siding." The court concluded that while the siding was not a private siding, it was within the meaning of the term "or other sidings" and that as the car had not been attached to a train there was no liability. Said the Court:

"If we seek for the reason for the condition, we are confirmed in the view that it applies to

> all sidings, both public and private. The object and purpose of the condition is to define when the carrier's liability for lost property loaded on cars shall begin and shall terminate. The meaning and intent of the stipulation, which is a term of the contract of carriage, is that liability for such property shall begin when the car is removed from the siding and attached to a train, and shall terminate when it is detached from the train and placed on a siding."

As will be seen from the above decision there was a regularly appointed agent at Passaic, New Jersey. This fact did not prevent the court from holding that there was no liability.

The case just discussed afterwards went to the Court of Appeals of New York. (Bers v. Erie Railroad Co., 225 N. Y., 543; 122 N. E. Rep. (N. Y.), 456). The judgment was affirmed. The Court of Appeals said:

> "It was not a private siding. Private sidings include mainly those which are owned or maintained by shippers for the purpose of connecting their factories and warehouses with the tracks. They thus provide themselves with conveniences which the railroad fails to furnish. It was not a public siding, open to the use of the shipping public in general, for the loading and unloading of cars, *like the freight station and yards. It was not a part of the*

railroad terminal or freight station. It was separate therefrom as effectively *as if the warehouse had been five miles from the freight depot. It was an industrial switch, a terminal facility for the use and convenience of the shippers whose warehouses were adjacent thereto.* It was like a private siding in all respects except that the carrier owned it. These shippers were fortunate enough to have the advantage of a private siding without the burden of private ownership. If any force is to be given to the words 'or other,' as qualifying rather than amplifying the word 'private,' they must be extended to include such a siding as this. Thus full meaning is given to the words used and the apparent purpose of the parties is accomplished."

In the case of Standard Combed Thread Company v. Pa. R. R. Co., 88 N. J. Law, 257; 95 Atl. Rep., 1002; L. R. A. 1916 C, 606, the same paragraph of the bill of lading was construed. In that case the court said:

"Defendant maintained what is called a 'public siding' near plaintiff's factory, and was accustomed to place cars thereon for the convenience of plaintiff and other shippers in loading. The station of defendant company was *one-half mile away*, and the custom was for plaintiff to telephone for a car when needed, *to defendant's freight agent* at the station, and

a car would be placed, and the shipper allowed forty-eight hours to load it."

And the court further said:

"But assuming a delivery, still, under the terms of defendant's uniform bill of lading, the goods remained at the risk of the shipper. The 'Carmack amendment,' which is part of section 20 of the Interstate Commerce Act as amended by the Hepburn Act of June 29, 1906, (34 Stat. at L. 584, Chap. 3591, Comp. Stat. 1913, Sec. 8563, quoted in Adams Exp. Co. v. Croninger, 226 U. S. 491, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257, 33 Sup. Ct. Rep. 148), requires the issue by carriers of a bill of lading. Under the act, and the regulations made by the Interstate Commerce Commission pursuant thereto, defendant was required to submit and publish with its tariffs a uniform bill of lading; and, in the absence of a disclaimer by the shipper and the acceptance of a 10 per cent. higher rate, the terms of the uniform bill of lading are declared applicable. Such a bill of lading was submitted, approved and published. It contained the clause quoted above. In International Watch Co. v. Delaware, L. & W. R. Co., 80 N. J. L. 553, 78 Atl. 49, affirmed in 82 N. J. L. 528, 82 Atl. 730, on the opinion delivered in the Supreme Court, it was held (page 556 of 80 N. J. L.) that 'where no bill of lading is given, the shipper himself stands in the same position as if he was the lawful holder of such bill of lading, and the liability of the company

to such shipper is the same liability as is imposed in favor of the lawful holder of a receipt or bill of lading.'

"The clause in question, then, was binding on both parties, and it remains to ascertain whether the siding in question was a 'private or other siding.' It was not a private siding. The trial court held the view that a public siding was not in the intendment of the clause, an 'other' siding. We do not share the view. If sidings are to be classified into private and other sidings, the other sidings would necessarily be other than private, and the logical alternative to 'private' is 'public.'

"On the facts stipulated, the defendant was entitled to judgment."

In the case of Bianchi & Son v. Montpelier & W. R. Co. 92 Vt. 319, 104 Atl. Rep. 144, the same clause of the bill of lading was construed. In that case it appeared that there was a shipment of a granite monument from Barre, Vermont, to St. Louis, Mo. The car containing the monument was delivered upon the "switch" of one Tieman. As to the switch the court said:

"The L. H. Tieman mentioned, lived at St. Louis, and had had the switch in question built by the Missouri Pacific Railroad for his convenience, it being understood that he should be responsbile for the freight charges on all

shipments placed on that switch. The switch or siding named abutted on Tieman's land, and no one except Tieman and the railroad company could have goods placed thereon without the former's consent."

The question involved was the liability of the railroad as an insurer after the placing of the car on Tieman's switch. Said the court further:

"This provision is reasonable in the eye of the law, and not inconsistent with public policy; and the law presumes that the plaintiffs assented thereto and agreed to be bound by it. Davis v. Central Vermont R. Co., 66 Vt. 290, 29 Atl. 313, 44 Am. St. Rep. 852; Leavens v. American Express Co., 86 Vt. 342, 85 Atl. 557, Am. Cas. 1915 C, 1188.

"When the car containing the monument was delivered on the Tieman switch specified, and was detached from the train, and the consignees were given a reasonable opportunity to inspect the monument and take it away, the responsibility of the carrier, as such, ceased."

On the facts the court also held the railroad company not liable as a warehouseman.

In Y. & M. V. R. R. Co. v. Chickasaw Cooperage Co., 141 Ark. 71, 215 S. W. 897, the clause of the bill of lading in question was held to grant exemption from liability even at an agency station until

the loaded car had been attached to a train. In that case the car was loaded at Clarksdale, Miss., where the Railroad Company had an agent, but on a side track or spur leading to the lumber yard of the shipper. In holding that the stipulation was valid and that it operated to postpone the carrier's liability as an insurer until the car had been attached to a train, the court said:

> "This contract does not undertake to limit the Railroad Company's liability as a common carrier; it merely defines the circumstances under which delivery for shipment and acceptance by the Railroad Company shall be understood as having taken place between the parties. The liability of the Railroad Company, under the Interstate Commerce Act, attaches as soon as the goods are delivered to the carrier for immediate shipment and are accepted by it. By the clause in question the parties undertook to agree when the delivery and acceptance were complete, and the meaning and intent of the clause in question was that the delivery for shipment and acceptance should be complete when the car was removed from the siding and attached to a train. This was a valid agreement under the principles of law decided in St. Louis, I. M. & S. R. Co. vs. Jones, 93 Ark. 537, 125 S. W. 1025, 137 Am. St. Rep. 99."

It will be noted that in the decisions in which exemption from liability has been held to apply to

loaded cars which have not been attached to trains, the courts of New York, New Jersey, Vermont and Arkansas did not discuss whether the words "at which there is no regularly appointed agent" were a part of the clause relied on, but the facts showed that in each instance there was a regularly appointed agent at the "station" or "freight house."

The gist of these opinions is that even though there is an agent *at a public railroad freight house or station,* the liability of the carrier as to cars loaded on side tracks (not part of the freight house facilities) does not begin until such cars are attached to trains, regardless of whether the side track be absolutely private or absolutely public or quasi-private or quasi-public. In order that the liability of a common carrier may attach before cars loaded on side tracks are attached to trains, it must appear that the side track on which the loading is done is in reality the *house track* of the station or freight house or an *integral part* of the station building and immediate station facilities, over which the agent at the station could reasonably be expected to exercise supervision and care. The loading in this case was done by the shipper on private property at a gin owned by a third party and a thousand feet distant from the station. Under these facts we insist that the exemption granted by the last clause applies with full force.

While the construction of the meaning of the sentence from a grammatical standpoint is not necessarily conclusive, yet it is persuasive, and construing the paragraph of the bill of lading from a grammatical standpoint it seems clear that the words "at which there is no regularly appointed agent" should not be brought forward into the second clause.

But even bringing these words forward into the second clause does not lead to the effect given to the clause by the Supreme Court of Mississippi. *There was no regularly appointed agent of the railroad at the cotton gin.* There was a regularly appointed agent at the freight house whom the law would expect to have custody and control of goods in the freight house and of goods on house tracks or side tracks immediately adjacent to the freight house, that is, such tracks as were a part of the freight house facilities. But the law would not expect an agent to exercise supervision and care over a car on private property loaded at a gin of a third party and a thousand feet away from the freight house. Indeed, the Court judicially knows that in large terminals side tracks, such as the one in question, are frequently many miles away from the freight station.

THE EXEMPTION FROM LIABILITY APPLIES TO ALL CARS LOADED ON ANY KIND OF A SIDING WHICH IS NOT AN INTEGRAL PART OF STATION OR FREIGHT HOUSE FACILITIES.

In Bers v. Erie R. R. Co., 122 N. E. (N. Y.) 456, the Court of Appeals of New York had under consideration a car loaded on a side track *only* 140 *feet* from the freight house of the railroad company. The track was owned entirely by the railroad company and was entirely on property of the railroad company and was used by warehouses abutting on said side track, and also by the railroad company for its own purposes. In that case the Court of Appeals of New York said:

> "It was not a public siding, open to the use of the shipping public in general, for the loading and unloading of cars, *like the freight station and yards.* It was not a part of the railroad terminal or freight station. It was separated therefrom as effectively as if the warehouse had been five miles from the freight depot. It was an industrial switch, a terminal facility for the use and convenience of the shippers whose warehouses were adjacent thereto. It was like a private siding in all respects except that the carrier owned it. These shippers were fortunate enough to have the advantage of a private siding without the burden of pri-

> vate ownership. If any force is to be given to the words 'or other,' as qualifying rather than amplifying the word 'private,' they must be extended to include such a siding as this. Thus full meaning is given to the words used and the apparent purpose of the parties is accomplished."

The Supreme Court of New York, in the same case, (163 N. Y. Supp. 116), said of the same track that it was used for the storage of cars and for "making up and unmaking trains;" that is for general railroad purposes.

The decision of the Court of Appeals of New York, we submit, gives the correct construction and effect to this clause of the bill of lading. In other words, it is entirely reasonable that a railroad company's liability as a common carrier should begin immediately on the issue of a bill of lading as to goods delivered at its freight house or on its freight house platform or into cars which are standing on side tracks immediately adjacent to the freight house and which are an integral part of the freight house facilities. But it is not reasonable to expect, when a shipper, instead of delivering his cotton at the freight house, or the freight house platform, or into a car immediately adjacent to the freight house, elects instead to deliver his cotton on a side track on private property at a cotton gin, that liability should begin until the car is attached to a

train. That is, the clause is to be construed in the light of common experience and reason and in the light of the well-known practice of railroads.

It appears from the plaintiff's proof in this case that there was a cotton platform at the station upon which cotton could be delivered for shipment (Rec. p. 24). And it appears that the plaintiffs, in some instances, had hauled cotton to the station platform for shipment (Rec. p. 28). This cotton platform of the railroad has a capacity of from fifty to one hundred bales (Rec. pp. 24, 44). *The plaintiffs, having elected to load their cotton on private property at a cotton gin where the agent of the carrier could not be expected to give it care and supervision, instead of loading their cotton onto the cotton platform at the station where the agent would be expected to give it care and supervision,* must assume liability for the cotton and should assume liability for the cotton until the car containing same became attached to a train.

It must not be overlooked that the track was constructed as an industrial track for Mr. Rainer, the owner of the land upon which parts of the track rest. Mr. Rainer, a witness for the plaintiffs, testified:

> "Q. Mr. Rainer, do I understand you to say that before this track was installed, or con-

structed, you made application to the railroad company for an industrial track; did you?

A. I did.

Q. What was your idea in doing that?

A. I wanted to erect a gin there, and I wanted to put my cotton platform and seed house on the track.

Q. You wanted it there for your convenience, and convenience of your patrons?

A. Yes, sir.

Q. And they did construct the track on your application?

A. Yes, sir.

Q. And the condition on which the track was constructed is embodied in this written contract that you have testified to?

A. Yes" (Rec. p. 35).

Mr. Rainer also said:

"A. Whenever I requested the agent to set a car on that track, the agent or conductor would have it placed where I wanted it, or anybody else getting a car, lots of friends would make a request that they put them out on that track, the agent or conductor to switch them out on there" (Rec. p. 34).

Mr. Rainer also testified:

> "Q. Well, when the railroad company undertook to put a track in there, you gave them the right of way?
>
> A. Well, I didn't give them the land. I gave them permission to put it on my land; but I didn't deed them the land" (Rec. p. 33).

Certainly, under these conditions, the car of cotton loaded at the gin on the land of a third person could not reasonably be expected to be at the risk of the railroad company until the railroad company took actual possession of same by attaching the car to a train, and the clause in the bill of lading so providing is therefore entirely reasonable and valid and should be given its natural meaning and effect.

THE DECISIONS CONTRA.

The decisions contra are the decision in this case, Y. & M. V. R. R. Co. v. Nichols & Company, 120 Miss. 690, 83 Sou. Rep. 5, (Rec. p. 76), and the cases of Jolly v. Atchison, Topeka & Santa Fe R. R. 21 Calif. Appeals, 368, 131 Pac. 1057, and McClure v. Norfolk & Western Railway Company, 83 W. Va. 473, 98 Southeastern, 514.

We respectfully submit that these opposing authorities just cited are based upon the erroneous proposition that the last clause of the bill of lading in question, which exempts the carrier from liability until cars loaded on private or other sidings are attached to trains, has no application in any city, town or terminal where the railroad maintains an agent, notwithstanding the siding, where the car is loaded, is not a part of the freight house facilities and may be located miles away from the freight house. The construction given by these courts would make common carrier liability attach to a car loaded in the City of Chicago on a private siding ten miles from the freight house, and merely for the reason that there is a regularly appointed agent at the freight house. We submit that this is a complete "non sequitur," and a most strained and unnatural construction, and one that cannot be upheld on the accepted rules of construction of contracts read in the light of the facts of this case and the known practices of railroad companies in handling carload freight.

There were other questions raised in the case before the Supreme Court of Mississippi, but it is unnecessary to discuss them, as the Supreme Court of Mississippi has based its decision entirely upon the construction and effect of the bill of lading and

held upon that basis that the trial judge was correct in directing a verdict for plaintiffs.

We respectfully insist that the case should be reversed and remanded for a new trial.

Respectfully submitted,

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In the Supreme Court of the United States

No. 655 216

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and
THE UNITED STATES FIDELITY AND GUARANTY COMPANY
Petitioners

versus

NICHOLS & COMPANY
Respondents

Statement of Facts and Brief for Respondents

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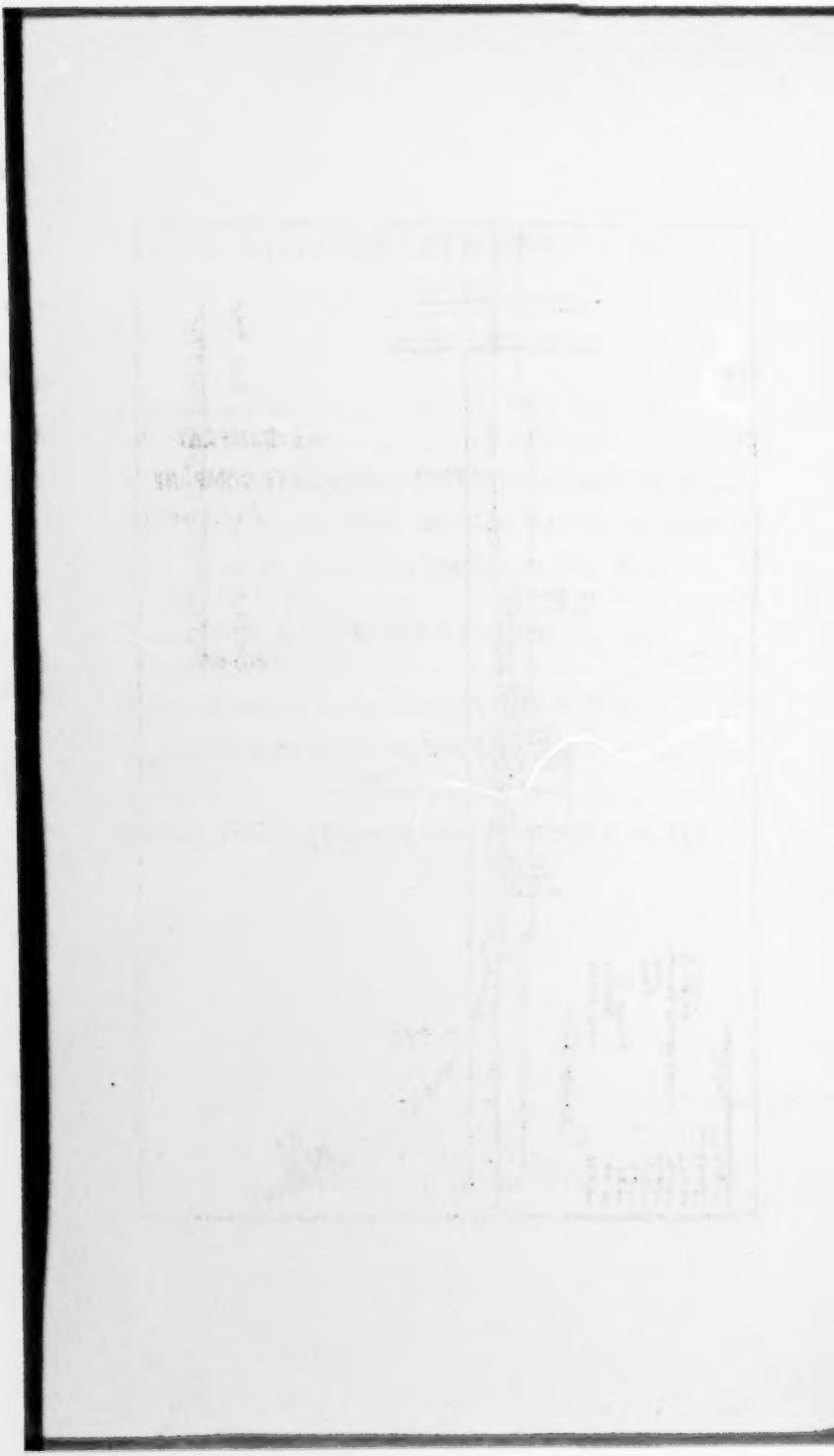

In the Supreme Court of the United States

No. 655

THE YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY and THE UNITED STATES FIDELITY AND GUARANTY COMPANY
Petitioners

versus

NICHOLS & COMPANY
Respondents

BRIEF FOR RESPONDENTS

STATEMENT OF FACTS

The respondents, Nichols & Company, desiring to ship their cotton from Alligator, Mississippi, to Memphis, Tennessee, so informed the station agent of the Yazoo & Mississippi Valley Railroad Company, at Alligator, Mississippi. The station agent placed a car at their disposal, placing same upon a spur, which, for convenience sake we shall call the "proposed" spur. The respondents loaded their cotton into this car and received from the agent a bill of lading. The car was then in the hands of and in the complete control of the railroad company.

The "proposed" spur was a part of the terminal facilities and freight yards of the railroad company, as found by the trial court, and the Supreme Court of Mississippi, at that place, the public regarded it as such, and the record shows that ninety per cent of the carload freight of Alligator, was handled on the "proposed" spur. An inspection of the map made by agreement, a part of the record, prepared by the railroad company, a reduced reproduction whereof is inserted herein, will show that the "proposed" spur is within sixty feet of the depot, at which three employees of the railroad are stationed. It is also significant to note that the map prepared by the railroad company call the alleged "private siding" the "proposed" spur.

The map shows that the only other track provided for loading and unloading all classes of freight other than car load freight, also was a "spur" nine hundred and fifteen feet long, of which less than two hundred feet are available to the public, due to the fact that buildings, crossings, and private platforms and houses occupy the rest. Its location, too, was inconvenient for loading and unloading car load lots of freight.

That it was a "spur," with a blind end, instead of a "siding" regularly connected with the main line track at each end, added to its insufficiency as one of the facilities for the handling of the business of the railroad company, and increased the necessity for other facilities.

It is evident, therefore, that there was an absolute need of more trackage for freight yard and terminal facilities, in order to handle the full amount of the carload traffic of the community, which consisted of cars of lumber, coal, grain, drygoods and other commodities

required by the community. Such were placed uniformly upon the "proposed" spur, without suggestion from consignees.

Furthermore, the only set of track scales in the town was placed on the "proposed" spur, and was used by the railroad company in all its weighing.

After the cotton had been loaded in the car, and bill of lading issued by the railroad company, the same caught fire and was destroyed.

Wherefore respondents brought this action and recovered judgment. An appeal was prosecuted by the railroad company from this judgment, and the judgment was affirmed by the Supreme Court of Mississippi. Whence this petition for the review of that judgment is sought to be maintained.

BRIEF AND ARGUMENT

CONSTRUCTION OF THE CONTRACT

Petitioners in this case rely for a reversal of this case, because of the construction by the Supreme Court of Mississippi placed upon the bill of lading mentioned as issued by the Yazoo & Mississippi Valley Railroad Company, to the respondents, Nichols & Company. This bil lof lading provided, among other things, the following:

"Property destined to or taken from a station * * * at which there is no regularly appointed agent shall be entirely at the risk of owner after unloaded from cars * * * and when received from or delivered on private or

other sidings * * * shall be at owner's risk until the cars are attached to and after they are detached from trains."

In construing this provision of the bill of lading, the Supreme Court of Mississippi said:

"Whatever differences may exist as to the construction to be placed upon the quoted provisions in the bill of lading, we prefer and adopt as the more reasonable view, the construction which the Supreme Courts of California and West Virginia have placed upon this paragraph in the uniform bill of lading. Jolly vs. A. T. & S. F. Ry. Co., 21 Cal. Ap. 308, 131 Pac. 1057; McClure vs. Norfolk & Western Ry. Co. (W. Va.) 98 S. E. 514. Under this view, the paragraph should be construed as a whole, and the phrase 'at which there is no regularly appointed agent' should be held to qualify the last clause, as well as the first clause of the provision. If there is a reasonable doubt as to the true interpretation to be given this clause of the bill of lading, we are justified in construing the contract more strongly against the defendant. It will be observed that the paragraph is written and must be read as a whole, and that the word 'property,' the first word used, is the subject of the entire paragraph; that the so called 'last clause' of the provision is separated from the first by a comma, and by proper grammatical construction, this last clause in reference to property received or delivered on private or other sidings * * * has application only to those places where there is no regularly appointed agent. As well stated by the Supreme Court of West Virginia in the McClure case, the term 'private or other siding,' in the last clause, necessarily means private or other sidings because all railroad sidings fall in one

or the other class. The word "private" is contra-distinguished from "public."

See reported case, 126 Mississippi Reports, 690.

We respectfully submit that the Mississippi Supreme Court has correctly construed the contract of the carrier, no matter in what light the contract may be considered.

As to the interpretation of the phrase "private or other sidings," we submit that it is a question of *ejusdem generis*, and that the expression "other sidings" means other *such* sidings, that is, sidings private in their nature, whether wholly or partially private, as being the subject of sole or partial private ownership, use or enjoyment, and whether used and enjoyed by one or many, not embracing in the right to the use and enjoyment, the general public, or the public at large.

But certainly it cannot be contended that the "proposed" spur is a siding of any such nature. From an inspection of the record, it is clear that the findings of the trial court, and the findings of the Supreme Court of Mississippi, are correct. Uninterrupted use of this "proposed" spur by the railroad company and by shippers generally, embracing the public at large, was essential to the prompt and efficient handling of incoming and outgoing carload lots of freight. Its location was right at the depot and it was used continuously by the railroad company as a part of its freight yards and depot facilities.

It will be observed from the map made by the railroad company, that the only other track for the hand-

ling of freight, that one above referred to as passing along near the depot, and the Darr lumber platform, and the cotton seed house of Leslie, is denominated a "spur," and that the track upon which the car load of cotton was destroyed, was denominated a "proposed" *spur*, so that in the eyes of the railroad company, they were both one and the same as to uses, as well as one in nomenclature. This "proposed" spur when reduced to reality, serves the same purposes as were served by the "spur" in existence when it was constructed.

It does not appear to us that the effect of any of the decisions relied upon by petitioners, can serve to change in legal contemplation, the character of this "proposed" spur from what it was and is, to one clearly embraced within the limited meaning of the term "private," or partially or qualifiedly, private, in any respect.

Discussions of this phrase "private or other sidings," which would seem to be valuable to the court in deciding this question raised upon the bill of lading, are found in the following cases:

The case of Bers et al vs. Erie R. Co., 163 N. Y. S. 114, has a dissenting opinion concurred in by two Justices, which presents a most reasonable analysis of the questions presented in that case. In discussing the effect of the terms of a similar bill of lading, with reference to "private or other sidings," the Court said:

> "In the view I take of the evidence it is altogether immaterial whether the car was or was not attached to a train before the larceny of the property. The track upon which the car was loaded was neither a 'private or other siding' within the meaning of the bill of lading. It was merely a

part of defendant's terminal and freight yard. It was so placed with reference to the main tracks that it could be used for general switching purposes, car storage, or for the receipt and delivery of freight to the seventeen various business concerns adjacent to the track in the immediate vicinity of the freight house. In determining the rights and liabilities of the parties under this interstate shipment, we must be governed by the acts of Congress, bills of lading, and common-law rules as accepted and applied in federal tribunals. Cincinnati & Texas Pac. Ry. vs. Rankin, 241 U. S. 319, 36 Sup. Ct. 556, 60 L. Ed. 1022.

The track in question is not a private siding within the meaning of the bill of lading. In railroad law, as interrupted by federal tribunals, private sidings are those 'outside the carrier's right of way, yard, and terminals, and of which the railroad does not own either the rails, ties, roadbed, or right of way.' Conference Ruling 121 of the Interstate Commerce Commission. In the case of Associated Jobbers of Los Angeles, 18 I. C. C. 310, the Commission refers to a 'private' siding as 'one not owned by the railroad and which is not a part of the railroad's own terminals.' In the case of N. C. Y. & H. R. R. Co. vs. General El. Co., 219 N Y. 227, 114 N. E. 115, Judge Cardozo uses the following language:

'Private sidings, owned and maintade by shippers, do not constitute the right of way, and the use that the carrier may be compelled to make of them is subordinate and incidental to the fulfillment of its primary function of carriage along its route'

See, also, Los Angeles Switching Case, 234 U. S. 294, 34 Sup. Ct. 814, 58 L. ed. 1319.

Nor is the track in question to be included in the term 'other sidings.' These words do not comprehend within their meaning *all* sidings other than privae aidings; for instance, they would not include a siding directly in front of defendant's freight station in charge of an agent. They doubtless refer to those sidings which, like private sidings, are not owned and controlled by the railroad. They would include a public siding, since a public siding cannot be said to be owned by the railway.

Thus construed, this bill of lading absolves the defendant from liability for loss of property at its own station, wharf, or landing, where it has no regularly appointed agent after the property has been unloaded from cars or vessels, and, in case of shipments at those places, until loaded into cars or vessels; and when the property is received from or delivered at wharves and landings not owned by the defendant, it is not liable for loss until the cars are attached to a train, and in case of delivery it is not liable after they are detached therefrom; and, finally where the property is placed in cars on private side tracks, or on other tracks over which the railroad has no control, the property is at the owner's risk until the car is attached to a train, or, in case of delivery, the defendant is not liable after the car is detached therefrom.

Even if we deem defendant's track to be an industrial spur or siding, because it serves more or less exclusively several private industrie adjacesnt to it, it is not a 'private or other siding' within the meaning of the bill of lading. Referring to industrial spurs and sidings, the Interstate Commerce Commission has said in the case of Associated Jobber Case, 18 I. C. C. p. 312:

'. . . These industry spur tracks are not private, in that the carrier may use them for pur-

poses of his own—as for storage of cars, as loads to other industries, and sometimes for public delivery. * * * Each of such spurs is in a real sense a railroad terminal at which the carrier receives and delivers freight—a special, and generally in practice an exclusive, railroad depot for the carload freight of a particular shipper. * * * We are fully convinced * * * that they are portions of the terminal facilities of the carrier with whose lines they connect, and, together with the team tracks and other yards, form the terminal facilities of these carriers.'

The Commission accordingly found that the contract of carriage was not performed until there was a delivery by the carrier at the industry on the spur track. The Tap Line Cases, 234 U. S. 1, 25, 34 Sup. Ct. 741, 58 L. ed. 1185."

It will be noted that the dissenting Judges in that case made the same point that Judge Pound made in the opinion of the Court when this case was appealed to the Highest Appellate Court of New York, that is, he interprets the words "other sidings" to mean not all sidings which are not private, but only those sidings which in their nature are like private sidings, and he maintained and construed the bill of lading to mean this, that the terms of the bill of lading could not possibly absolve a railroad company of its liability as an insurer for all goods received on all side tracks.

The case of Chas. Bianchi & Sons vs. Montpelier & W. R. R. Co., 104 Atl. 144, was an action brought by the plaintiffs, Chas. Bianchi & Sons, as consignees of certain freight for the non-delivery of said freight. It seems that the consignment of freight was billed to be delivered on a certain side track called Tieman Switch, which was a private siding built by the railroad for the

sole use of the said Tieman. In the contract of building this side track it was provided that no freight could be delivered upon it without the consent of the said Tieman, and it was also provided that Tieman would consider as delivered to him freight when it had been switched on to this siding. The freight in question was delivered by the railroad company upon that track and it was unloaded by certain people other than the correct consignees. The Court held that inasmuch as the bill of lading designated this particular siding as the place of delivery then the company had complied with its contract when it delivered it thereon and could not, therefore, be held for the loss of the goods after it was delivered.

We submit, therefore, that the construction which we seek to maintain as being the correct construction of this phrase in the bill of lading is entirely correct.

JURISDICTION

Granting for the sake of argument, however, that the construction of this provision by the Supreme Court of Mississippi, and by the other courts referred to, is entirely incorrect, nevertheless we insist, that this court has no jurisdiction to construe, interpret or pass upon this provision of the bill of lading, inasmuch as no title, right, privilege or immunity guaranteed to the petitioners by the Federal Constitution, was infringed by such construction of the Supreme Court of Mississippi, nor was any such construction thereof in contravention of any treaty, statute, commission or authority of the United States.

The contract evidenced by the bill of lading was the voluntary act of the carrier and its execution and issuance were not enjoined or made mandatory by any act or authority of any controlling agency of the Federal Government.

The Carmack amendment required of carriers in interstate commerce to issue a through bill of lading, so as to bind connecting carriers and ensure through transportation, but the act did not in any way provide for the terms or conditions that must be contained in that bill of lading, except to provide that if the bill of lading did exempt the carrier from loss or damage caused by it, such a stipulation should be void, and to provide further, that the carrier should be liable to the holder of the bill of lading for the loss or damage caused by it, notwithstanding an exemption in the bill itself. In this case, no connecting carrier was involved, the entire transportation having been undertaken by petitioner railroad company. We contend, therefore, that the act in question could not apply, while petitioners insist that in pursuance of the mandate of the act, a bill of lading was issued in this case.

The Interstate Commerce Commission did undertake in one instance, the adoption of forms of bills of lading for certain carriers. The power to adopt these forms was disputed; and on consideration by the court, it was held, that the Interstate Commerce Commission was "without any authority conferred upon it to draw the carriers bills of lading either in whole or in part. If they are in any respect unjust or unreasonable or unlawful, the courts are open to the parties injured. * * * The question is one of power, (to prescribe bills of lad-

ings), * * * and we think it has no power to make them."

Alaska Steamship Co. et al., vs. U. S. Interstate Commerce Commission, 259 Federal Rep. 713;

United States vs. Alaska Steamship Co. et al., 253 U. S. 113; 64 L. E. 808 (same case;)

Interstate Com. Commission vs. I. C. R. R. Co. 215 U. S. 470; 54 L. E. 280.

The decision in the Alaska Steamship Company and Central of Georgia Railway Co. case above referred to, if not conclusive, is persuasive at least, in our direction, so far as the facts in that case are like the facts in this case, with respect to the power to prescribe forms of bills of lading. But in the present case, as the records of the Interstate Commerce Commission show, the Commission *refused* to assume any authority to prescribe any form of bill of lading, but made suggestions only, on that subject.

Nevertheless, merely because the bill of lading in this case is what is termed a *uniform bill of lading*, counsel for petitioners proceed upon the assumption that it has the authority of law to support it, and on such presumption, they base this proceeding,—while the facts are to the contrary.

We submit that the effect of the issuance of such a bill of lading cannot be that for which the petitioners contend.

This uniform bill of lading is the one which was recommended for adoption in the report of the Interstate Commerce Commission relating to the subject of bills of lading, which report is dated June 27, 1908, and is to be found in volume 14, Interstate Commerce Commission Reports, at page 346. It will be noted from the report as stated, that the Commission did not undertake to prescribe this as a uniform bill of lading, to be used in every case involving an interstate shipment. The form was merely recommended for adoption by the carriers after a conference with the representatives of certain carriers and the shippers of this country. In its report upon the matter, Chairman Knapp said: "Nor do we undertake to prescribe this bill of lading and order its adoption, because we are convinced that such an order would exceed our authority."

In the case of Cleveland, C., C. & St. L. R. R. Co. vs. Detlebach, 239 U. S., 588, the Court pointed out the fact that the uniform bill of lading has no binding effect in law, that is, has not the weight of a statute of the United States. It said:

> "The recommendation of the Interstate Commerce Commission for the adoption of a uniform bill of lading was of course made in view of this legislation, and while not intended to be and not in law binding upon the carriers, it is entitled to some weight."

We have gone into the question of uniform bills of lading because, as stated, counsel for petitioners seem to have the idea that merely because the uniform bill of lading was used in this instance, the Federal Supreme Court has jurisdiction to construe its terms. We, of course, deny any such contention. We contend that the Federal Supreme Court has no more jurisdiction to con-

strue the terms of a uniform bill of lading as such than it would, as of course, have the right to construe the terms of any other bill of lading. In other words, the uniform bill of lading has no more effect to give this Court jurisdiction than if a special contract to govern the terms of some other particular shipment were the subject-matter of this controversy.

A State court having full jurisdiction has construed a certain clause in that bill of lading, which was issued in this instance, and the Court held that the carrier was liable because his contract, written by him, provided that he would be liable in such a case. It may be said it was the intent of Congress, in enacting the Carmack amendment, to take over the whole domain of interstate commerce, but we submit that the most that can be said of the statute is, that it intended that a carrier should not by any contract exempt itself from the liability for damage caused by it, and, inferentially, that no State statute or court should deny to the carrier the right to limit its liability to the loss or damage caused by it. The cases that have been before the Court so far are cases in which State courts have held that a carrier was responsible for loss or damage other than that caused by it, beyond the terms of an express stipulation in the bill of lading, or in which the limit of liability had been fixed by the shipping contract; and had the Supreme Court of Mississippi decided that the carrier was liable for loss or damage not caused by it, notwithstanding an express stipulation in the bill of lading limiting its liability, then it might well be that the railroad company could contend it had been denied a right guaranteed to it by the Carmack amendment, towit, the right to limit by contract its liability for the damage caused by it. But such is not the case presented here. It

must be borne in mind that unless petitioners have been denied a title, right, privilege, or immunity, guaranteed to them by the Carmack amendment, then this Court will have no jurisdiction.

There is another thing to be considered about the Carmack amendment, and that is, that it does not fix the extent of a carrier's liability in cases involving interstate commerce, but rather fixes a minimum below which the carrier may not exempt itself, and as decided by this Court, it guarantees to the carrier the right to limit its liability by the minimum established by the act. The Carmack amendment does not provide that a carrier cannot and shall not assume any greater liability for loss or damage than that caused by it.

In this instance the carrier issued a bill of lading which contained, among other stipulations, the one the construction of which is the subject-matter of this controversy. Both the trial court and the Supreme Court of Mississippi, in construing the peculiar wording of that particular stiplation, and applying the facts of this case to its meaning, held that the intent of the parties to the contract of carriage was that the carrier should be liable. Is that a denial to the carrier of a title, right, privilege, or immunity arising under the Carmack amendment? We respectfully submit that it is not.

The effect of the decision of the State courts is not that a carrier could not exempt itself from liability under the facts of this case, but it is simply that it has not done so; that is to say, the Supreme Court of Mississippi has not denied to the carrier the right to make a contract which would have limited its liability so as to give it an exemption on the facts presented at the trial, but

it has simply held that the contract actually made between the carrier and the shipper provided for liability in this case. It is also manifest that the decision of the Mississippi court does not involve the question of the validity of a stipulation contained in the bill of lading, but involves the construction of one of its stipulations. The State court has not denied the binding force and effect of any term contained in the bill of lading. It has merely construed a stipulation to mean that the petitioners are liable by reason of the very terms of its contract.

We have heretofore discussed the history of the adoption of the uniform bill of lading and its legal effect as related to the jurisdiction of this Court and of the State courts. It is pointed out in petitioners' brief that several State courts have consrued the particular stipulation in this uniform bill of lading, and that there exists a diversity of opinion as to what it means. We do not think it is worthy of argument that this fact will suffice to give this Court jurisdiction. As stated, the uniform bill of leading stands in the same position as if it had never been issued by many carriers, and in legal contemplation, it is no more than a coincidence that the same contract has come up for construction in the courts of different States.

Recurring, however, to the main point under discussion, that is, whether or not, in truth and in fact, the petitioners have been denied a Federal right, we call the Court's attention to those cases which have been decided by it since the passage of the Carmack amendment, and the opinions of which cases throw light upon the problem.

Adams Express Co. vs. Croninger, 226 U. S., 491.
Chicago, B. & Q. Ry. Co. vs. Miller, 226 U. S., 512.

Missouri, Kan. & T. Ry. Co. vs. Harriman Bros., 227 U. S., 657.

N. O. & N. E. R. R. Co. vs. Nat'l Rice Milling Co., 234 U. S., 80.

Boston & Me. R. R. Co. vs. Hooker, 233 U. S., 97.

George N. Pierce Co. vs. Wells Fargo Co., 236 U. S., 278.

Charleston & W. Car. Ry. Co. vs. Varn Ville Fur Co., 237 U. S., 597.

C., C. & St. L. Ry. Co. vs. Dettleback, 239 U. S., 587.

Sou. Ry. Co. vs. Prescott, 240 U. S., 632.

N. Y., Phila. & Norfolk Ry. Co. vs. Peninsular Produce Exc., 240 U. S., 34.

Atchison, Topeka & S. F. Ry. Co. vs. Harold, 241 U. S., 371.

Ga., Fla. & Ala. Co. vs. Blish Milling Co., 241 U. S., 190.

Cin., N. O. & T. P. Ry. Co. vs. Rankin, 241 U. S., 319.

St. L., I. M. & Sou. Ry. Co. vs. Starbird, 243 U. S., 592.

American Exp. Co. vs. U. S. Horseshoe Co., 244 U. S., 58.

The Croninger case, supra, was the first case after enactment of the Carmack amendment where the question of the validity of a stipulation in a bill of lading limiting the amount which might be recovered in case of loss of goods was decided. The Court held in that case, that such a stipulation was valid and binding, reversing the decision of the State court.

The cases subsequent to the Croninger case, so far as we have been able to determine, have all involved the question of the validity of a stipulation, and in no case has the jurisdiction of this Court been maintained solely to determine the proper construction of a stipulation. We contend that those cases which have held that various stipulations were binding do not overrule the contention which we make here. There is a great deal of difference between the validity of a stipulation and its construction. To deny the validity of a stipulation, we submit, would give to the Federal Supreme Court jurisdiction to determine whether or not the same was valid, and that question would be determined in accordance with a uniform rule as contemplated by the Carmack amendment, but to hold that when a State court has construed a stipulation, and that construction does not agree with the views of the losing side, would create jurisdiction, would be going very much further than this Court has yet gone. Otherwise, it would be an idle thing for this Court to declare that a State court has jurisdiction of such a suit. It would be tantamount to holding that in every

such case if a party were not satisfied with the decision of the State court, then he could seek redress, in the highest court of the land. Such, we submit, was not the intent of Congress, nor is it the intent of those cases to which we have respectfully called the Court's attention.

Justice Lurton, in his opinion in the case of Missouri, Kansas & Texas Ry. Co. vs. Harriman Brothers, supra, succinctly stated the rule by which it might be determined whether or not this Court would take jurisdiction of a suit where it was sought to enforce liability against a carrier in interstate commerce. He lays down the rule in this language:

> "The liability sought to be enforced is a liability of an interstate carrier for loss or damage under an interstate contract of shipment declared by the Carmack amendment to the Hepburn act of June 29, 1906. The validity of any stipulation is such a contract which involves the construction of the statute, and the validity of a limitation upon the liability thereby imposed is a Federal question to be determined under the general common law, and as such is withdrawn from the field of State law or legislation. Adams Express Co. vs. Croninger, supra."

The case at bar involves neither the validity of any stipulation in the bill of lading nor the validity of a limitation upon the liability.

Aside from all other considerations, the Federal question now relied upon was never raised or presented in the trial court, and was never raised or presented

in the Supreme Court. There was no plea presenting any Federal question and no issue raised thereon, and, therefore, we submit that regardless of all other considerations, the decision of this court should be adverse to the petitioners.

Mo. Pac. Ry. Co. vs. Taber, 244 U. S. 200; 61 L. E. 1082.

Godchaux Co. vs. Estiponal, 257 U. S. 179; 64 L. E. 213.

THE EFFECT OF THE FINDINGS OF FACTS

On the trial of this cause before the Circuit Court of Coahoma County, at the conclusion of the evidence of both parties, counsel for plaintiffs and for defendants, both requested the court to direct a verdict in their favor. Accordingly, the court on the pleadings and the evidence as they then stood, instructed the jury to return a verdict for the plaintiffs, Nicholls & Company.

This then took away the findings of facts from the province of the jury, and placed them in the bosom of the court.

As was said by the Chief Justice, in the case of Henry Buetell vs. Daniel Magone, 157 U. S., 157, "As, however, both parties asked the court to instruct a verdict, both affirmed that there was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, con-

cluded by the finding made by the court upon which the resulting instruction of law was given. The facts having thus been submitted to the court, we are limited in reviewing its action to consideration of the correctness of the finding of the law, ***and must affirm if there be any evidence in support thereof.***"

The trial court thus having been left to decide the case upon the facts, may be said to have found, among other undisputed things, that the spur track in question was a part of the terminal facilities of the railroad company.

The record shows that without the "proposed" spur track the facilities of the railroad company for handling freight were entirely inadequate. By simple computation from the evidence, the trial court knew that throughout the cotton season, the amount of cotton shipped out of Alligator, amounted to ***seventy-five bales daily.*** The cotton platform owned by the railroad company as shown by the map of petitioners, was only thirty-two feet by fifty-six feet, and this had a half-daily capacity of thirty-five or forty bales only, leaving no room for freight of other character. Thus it is clear that the railroad company was greatly in need of greater facilities. These were supplied by the "proposed" spur track where the loss occurred. The record shows that for twenty years the railroad company had used same not only for cotton, but for handling lumber, coal, grain, and other characters of freight.

It also appears that the railroad company had built the "proposed" spur track at its own expense, not merely as an accommodation to the owner of the gin, but in order to facilitate the movement of freight of all kinds.

thus relieving the congestion incident to insufficient accommodations.

The record shows further that this use by the railroad company of the track was with the permission of the owner of the land, and certainly without any protest from him.

The court may further be said to have found, that the railroad company was guilty of negligence in not moving the car in which the cotton was loaded from danger as soon as it was learned of the fire. The record shows that had the agent and officials of the railroad company acted promptly upon receiving the news of the fire, the car containing the cotton in controversy, could have been removed from danger. Instead, the railroad company did nothing.

The court may further be said to have found, that the railroad company was negligent in having placed other cars in front of the car in which the cotton was loaded, thus preventing said car from being removed by individual effort.

The court may further be said to have found, that the railroad company was negligent in not having sent the car North on the train which passed through Alligator at four P. M., Saturday afternoon, several hours after the car had been loaded and the agent notified. The agent gave as his excuse for not so doing, only that he had been busy doing something else.

We submit that if there is any evidence at all in support of the findings of facts of the lower court, or if the case could have gone off an any basis, theory

or ground of fact, and that a proper decision on the record, could have been reached without the absolute necessity to hinge a decision alone on a construction of the provision of the bill of lading, then there should be an affirmance of the judgments of the Mississippi Courts.

Upon a careful consideration of the record in this case, it does not seem clear that there is any error of which petitioners can rightfully complain, and, therefore, we urge that the case should be affirmed.

Respectfully submitted

J. W. CUTRER

SAM C. COOK JR.

J. C. CUTRER

Solicitors for Respondents

YAZOO & MISSISSIPPI VALLEY RAILROAD COMPANY ET AL. *v.* NICHOLS & COMPANY.

CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

No. 216. Argued April 22, 1921.—Decided June 1, 1921.

The Uniform Bill of Lading, approved by the Interstate Commerce Commission June 27, 1908, provides that "Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

Held: (1) That the words "at which there is no regularly appointed agent" apply to both clauses, (p. 544) and (2) that, where goods had been loaded into an outgoing car on a spur used generally by the public, which ran parallel to the main track and connected with it near a station having such an agent, and a bill of lading had issued, the goods were at the carrier's risk while the car remained there waiting to be attached to a train at the carrier's convenience, and the fact that the spur was partly on private land was immaterial. P. 546.

120 Mississippi, 690, affirmed.

REVIEW of a judgment of the Supreme Court of Mississippi, affirming a judgment against the railroad company in an action brought by the present respondent to recover for the loss of goods shipped on petitioner's railroad. The facts are stated in the opinion, *post*, 543.

Mr. Charles N. Burch, with whom *Mr. H. D. Minor*, *Mr. Clinton H. McKay* and *Mr. W. S. Horton* were on the brief, for petitioners:

The first clause refers to a public station, wharf or landing; the second clause refers to private wharves or landings and private sidings, and also to all other sidings,

whether the same be quasi-private or public, or quasi-public, but not including those public side tracks which are immediately adjacent to and serve a public station, and from which freight is unloaded into a public depot or loaded from a public depot into cars on such public sidings. The words "private or other sidings" do not include side tracks, team tracks, or house tracks immediately adjacent to a freight house, which are an integral part of the public freight house facilities. The last mentioned sidings are included in the term "station" in the first clause, as such tracks are as much a part of the station as the station platform. It appears from this record that there is what is called a house track which is immediately parallel with and adjacent to the freight depot and platforms.

At a station where an agent is maintained, the railroad becomes responsible as soon as goods are deposited on the freight house floor or platform, or placed in a car which is on a track which serves the freight house, and a bill of lading is issued.

The first clause means that if a carrier has a public station, wharf or landing, at which it does not maintain a regularly appointed agent, the carrier shall be responsible until inbound goods are unloaded from the cars, and as soon as outbound goods are loaded into cars.

The second clause means that when a party receives or delivers goods, not at a regular freight house, or not at a track serving the regular freight house, but on a private or other siding, then the liability of the carrier as a common carrier shall not begin until (as to outbound freight), the loaded cars are attached to trains, and as to inbound freight the common carrier's liability shall cease when cars are detached from trains.

We insist that where the shipper loads his own freight, as is the case here, and loads it at a public station, wharf, or landing, at which there is no regularly appointed

agent, the liability of the carrier under the first clause attaches as soon as the goods are loaded into a car; and we further insist that when a shipper does not choose to load his freight at a regular public freight house, but, on the other hand, chooses to load his freight at a private wharf or private landing or on any kind of a side track (which does not serve a public freight house), then the liability of the common carrier does not attach until the car containing such goods is attached to a train.

It is not reasonable to expect the station agent to have supervision of and to take care of property in cars on side tracks which are not immediately at a station building, but which are some distance therefrom, and particularly when the side track is located on land not belonging to the railroad company.

The court judicially knows that a large part of the tonnage of the country is loaded into cars which are on tracks quite remote from the place of business of the local station or depot agent. As to such cars the railroad company has a right to insist that its liability as a common carrier shall not begin until such cars are attached to trains. No one is required to load his freight on a private side track or a public side track remote from the regular depot. A shipper has the right if he chooses to deliver his freight at the regular freight depot or to load it into cars placed immediately adjacent to the regular freight depot. If the shipper, for his own convenience, elects to load his cars at some other point, then, certainly the carrier has a right to say that, in such event, the carrier's liability as a common carrier or insurer, shall not begin until the cars are attached to a train—until the cars are in the actual, as distinguished from the constructive possession of the carrier.

The loading in this case was done by the shipper on private property at a gin owned by a third party and a thousand feet distant from the station. Under these

facts we insist that the exemption granted by the last clause applies with full force.

Mr. John W. Cutrer, with whom *Mr. Sam C. Cook, Jr.*, and *Mr. John C. Cutrer* were on the brief, for respondent.

MR. JUSTICE BRANDEIS delivered the opinion of the court.

In November, 1917, the Yazoo & Mississippi Valley Railroad Company issued to Nichols & Company a bill of lading for 31 bales of cotton which had been loaded into a box car at Alligator, Mississippi, for shipment to Memphis, Tennessee. Before the loaded car had been attached to any train or engine it was destroyed by fire. The shipper sued in a state court of Mississippi to recover the value of the cotton. The carrier contended that by the terms of the bill of lading it was relieved from liability. The provision relied upon was the second clause of the last paragraph of section 5 of the Uniform Bill of Lading, approved by the Interstate Commerce Commission June 27, 1908, and duly filed and published as part of the railroad's tariff. The paragraph referred to is this:

"Property destined to or taken from a station, wharf, or landing at which there is no regularly appointed agent shall be entirely at risk of owner after unloaded from cars or vessels or until loaded into cars or vessels, and when received from or delivered on private or other sidings, wharves, or landings shall be at owner's risk until the cars are attached to and after they are detached from trains."

The shippers insisted that the provision did not apply, because at Alligator there was a regularly appointed agent and that the second clause of the paragraph, like the first, was applicable only to stations where there was none. The shippers also contended, on the following facts which

were undisputed, that the place where the car was received was, in effect, a part of the carrier's terminal and not a "private or other" siding within the meaning of the above provision.

The cotton had been loaded from the platform of a gin located at the blind end of a spur which leads from the main line at a point near the depot. The spur which is 1,000 feet long had been built by the railroad many years before at its own expense. About half of it is on the railroad right of way and runs parallel to the main line; the rest is on private land. Under the contract for building the spur the landowner furnished free the right of way over his own land; but the railroad was to have full control over the spur and reserved the right to abandon it at any time and remove the track material. The spur was used generally by the public for loading and unloading carload freight. The only track scale at Alligator was on it—as was also another gin.

Each party requested a directed verdict. A verdict was directed for the shippers. The judgment entered thereon was affirmed by the Supreme Court of Mississippi on the ground that the clause in question applies only to stations at which there is no regularly appointed agent. 120 Mississippi, 690. In the appellate courts of the States in which the question had arisen the decisions were conflicting.[1] For this reason a writ of certiorari was granted. 251 U. S. 550. The only question requiring decision here

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[1] The clause was held not applicable in *McClure* v. *Norfolk & Western Ry. Co.*, 83 W. Va. 473; *Jolly* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 21 Cal. App. 368. It was applied under different facts in *Chickasaw Cooperage Co.* v. *Yazoo & Mississippi Valley R. R. Co.*, 141 Arkansas, 71; *Standard Combed Thread Co.* v. *Pennsylvania R. R. Co.*, 88 N. J. L. 257; *Bers* v. *Erie R. R. Co.*, 225 N. Y. 543; 163 N. Y. Supp. 114; *Siebert* v. *Erie R. R. Co.*, 163 N. Y. Supp. 111. See also *Bianchi & Sons* v. *Montpelier & Wells River R. R.*, 92 Vermont, 319; *Bainbridge Grocery Co.* v. *Atlantic Coast Line R. R. Co.*, 8 Ga. App. 677.

is whether the court below gave the correct construction to the clause. In our opinion it did.

Whether goods destroyed, lost or damaged while at a railroad station were then in the possession of the carrier as such, so as to subject it to liability in the absence of negligence, had, before the adoption of the Uniform Bill of Lading, been the subject of much litigation. At stations where there is a regularly appointed agent the field for controversy could be narrowed by letting the execution of a bill of lading or receipt evidence delivery to and acceptance by the carrier; and by letting delivery of goods to the consignee be evidenced by surrender of the bill or execution of a consignee's receipt. But at non-agency stations this course is often not feasible. There the field for controversy as to the facts was particularly inviting and the reasons persuasive for limiting the carrier's liability. Local freight trains are often late. Shippers or consignees cannot be expected to attend on their arrival. Less than carload freight awaiting shipment must ordinarily be left on the station platform to be picked up by the passing train and lots arriving must be dropped on the platform to be called for by the consignee. At such stations the situation in respect to carload freight is not materially different. And this is true whether the car be loaded for shipment on the public siding or on a neighboring private siding, and whether the arriving loaded car be shunted onto a public siding or a private siding. There carload, as well as less than carload, freight, whether outgoing or incoming, must ordinarily be left unguarded for an appreciable time. It is not unreasonable that shippers at such stations should bear the risks naturally attendant upon the use. The reason why an agent is not appointed is that the traffic to and from the station would not justify the expense. The station is established for the convenience of shippers customarily using it. And the paragraph here in question

was apparently designed to shift the risk from the carrier to shipper or consignee of both classes of freight. It does so in the case of less than carload freight by having the carrier's liability begin when the goods are put on board cars and end when they are taken off. It does so in the case of carload freight by limiting liability to the time when the car is attached to or detached from the train. But, at a station where there is a regularly appointed agent, it would be obviously unreasonable to place upon the shipper, after a bill of lading has issued, the risks attendant upon the loaded car remaining on the public siding because it has not yet been convenient for the carrier to start it on its journey. It would likewise be unreasonable to place upon the consignee at such a station the risk attendant upon the arriving car's remaining on the siding before there has been notice to the consignee of arrival and an opportunity to accept delivery. The situation there would be practically the same whether the loaded cars were left standing on a public siding or on a siding to a private industry on the railroad's right of way, as in *Swift & Co.* v. *Hocking Valley Ry. Co.*, 243 U. S. 281, or on a siding, partly on the railroad's right of way and partly on private land, as in *Chicago & Northwestern Ry. Co.* v. *Ochs*, 249 U. S. 416, and *Lake Erie & Western R. R. Co.* v. *State Public Utilities Commission*, 249 U. S. 422, when the siding is, either by state law or by agreement and in fact, a part of the carrier's terminal system.

If we approach the construction of the second clause of the last paragraph of section 5 of the Uniform Bill of Lading in the light of this practical situation all doubt as to its meaning must vanish. It could not have been intended that at stations where there are regularly appointed agents outgoing loaded cars for which bills of lading have issued and which are left standing on a siding solely to await the carrier's convenience are to be at the risk of the shipper. And this is true whether the siding

be a strictly public one, or a semi-public one as in the *Ochs* and *Lake Erie & Western Cases, supra,* and the case at bar; or whether it be a siding privately used but owned by the railroad as in the *Swift Case, supra;* and in such cases the fact that the spur extends over land not part of the carrier's right of way is immaterial. The construction contended for by the railroad, even if not applied to team tracks in the freight yards of a great city, would place all loaded cars arriving elsewhere at the owner's risk from the moment they were detached from a train, although the consignee had not even been notified of their arrival.

It is clear that the immunity conferred by the last paragraph of section 5 does not apply to loaded cars on the spur here involved. Whether the same rule should apply to cars on strictly private industry tracks effectively separated from the terminal and exclusively under private control, like the industry tracks involved in *Bers* v. *Erie R. R. Co.*, 225 N. Y. 543, we have no occasion to determine.

Affirmed.